371 N.C.—No. 1 **Pages 1-120**

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

OCTOBER 29, 2018

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OF
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SUPREME COURT OF NORTH CAROLINA

CASES REPORTED

FILED 11 MAY 2018

PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

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ACCOUNTANTS AND ACCOUNTING

Accountants and Accounting—delinquent tax returns—fraudulent concealment—Where plaintiff sued defendant Certified Public Accountant and his firm for fraudulent concealment and punitive damages, alleging that defendants failed to properly prepare and file her delinquent tax returns and intentionally deceived her about the status of those returns, plaintiff presented sufficient evidence of both actual and constructive fraud to survive summary judgment. Plaintiff had an ongoing professional relationship with defendants related to the preparation and filing of her delinquent tax returns, and defendants knowingly misrepresented the status of the returns and negotiations with the IRS. **Head v. Gould Killian CPA Grp., P.A., 2.**

Accountants and Accounting—delinquent tax returns—professional negligence—statute of repose—Where plaintiff sued defendant Certified Public Accountant and his firm for professional negligence, alleging that defendants failed to properly prepare and file her delinquent tax returns and intentionally deceived her about the status of those returns, plaintiff presented sufficient evidence of genuine issues of material fact regarding the scope of the parties' contractual relationship and the time the corresponding last act occurred—and thus when the statute of repose began to run—so that her claim for professional negligence should have survived summary judgment. **Head v. Gould Killian CPA Grp., P.A., 2.**

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Accountants and Accounting—discipline by state board—petitioners' refusal to provide records—substantial evidence to support findings—Where petitioners—a Certified Public Accountant and her firm—allegedly failed to fulfill the terms of a peer review contract by failing to pay for the peer review, and the N.C. State Board of Certified Public Accountant Examiners revoked the firm's registration for three years or until petitioners fulfilled the terms of the peer review contract, the Supreme Court rejected petitioners' argument that the Board lacked substantial evidence to support the finding that petitioners failed to comply with Government Auditing Standards and generally accepted auditing standards. The Board was unable to review petitioners' full work papers only because petitioners refused to provide them. It would undermine a fundamental purpose of a regulatory board for a regulated party to be able to escape review and disciplinary action by refusing to provide records solely in its possession. **In re Johnson, 53.**

SCHEDULE FOR HEARING APPEALS DURING 2018

NORTH CAROLINA SUPREME COURT

Appeals will be called for hearing on the following dates, which are subject to change.

January 8, 9, 10
February 5, 6, 7
March 12, 13, 14, 15
April 16, 17, 18
May 14, 15, 16, 17
August 27, 28, 29, 30
October 1, 2, 3, 4
November 6, 7, 8
December 3, 4, 5, 6

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

ATLANTIC COAST PROPERTIES, INC., A DELAWARE CORPORATION, PETITIONER
v.
ANGERONA M. SAUNDERS AND HUSBAND, ALGUSTUS O. SAUNDERS, JR., LUCY M. TILLETT, PATRICIA W. MOORE–PLEDGER, GENEVIVE M. GOODMAN, LYNETTE C. WINSLOW, AND CARLTON RAY WINSLOW, RESPONDENTS

No. 365A15-2

Filed 11 May 2018

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 807 S.E.2d 182 (2017), affirming an order granting summary judgment entered on 16 November 2016 by Judge Milton F. Fitch, Jr. in Superior Court, Currituck County. Heard in the Supreme Court on 16 April 2018.

Hornthal, Riley, Ellis & Maland, LLP, by M. H. Hood Ellis and Casey L. Peaden, for petitioner-appellant.

Nexsen Pruet PLLC, by Brian T. Pearce and Norman W. Shearin, for respondent-appellees.

PER CURIAM.

For the reasons stated in the dissenting opinion, the decision of the Court of Appeals is reversed. This matter is remanded to the Court of Appeals for further remand to the trial court for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

KAREN HEAD
v.
GOULD KILLIAN CPA GROUP, P.A. AND G. EDWARD TOWSON, II, CPA

No. 27A17

Filed 11 May 2018

1. Accountants and Accounting—delinquent tax returns—fraudulent concealment

Where plaintiff sued defendant Certified Public Accountant and his firm for fraudulent concealment and punitive damages, alleging that defendants failed to properly prepare and file her delinquent tax returns and intentionally deceived her about the status of those returns, plaintiff presented sufficient evidence of both actual and constructive fraud to survive summary judgment. Plaintiff had an ongoing professional relationship with defendants related to the preparation and filing of her delinquent tax returns, and defendants knowingly misrepresented the status of the returns and negotiations with the IRS.

2. Accountants and Accounting—delinquent tax returns—professional negligence—statute of repose

Where plaintiff sued defendant Certified Public Accountant and his firm for professional negligence, alleging that defendants failed to properly prepare and file her delinquent tax returns and intentionally deceived her about the status of those returns, plaintiff presented sufficient evidence of genuine issues of material fact regarding the scope of the parties' contractual relationship and the time the corresponding last act occurred—and thus when the statute of repose began to run—so that her claim for professional negligence should have survived summary judgment.

Justice BEASLEY concurring in part and dissenting in part.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 795 S.E.2d 142 (2016), affirming in part and reversing in part and remanding an order granting partial summary judgment entered on 31 December 2015 by Judge William H. Coward in Superior Court, Buncombe County. On 16 March 2017, the Supreme Court allowed plaintiff's petition for discretionary review of additional issues. Heard in the Supreme Court on 5 February 2018.

Erwin, Bishop, Capitano & Moss, PA, by J. Daniel Bishop, for plaintiff-appellant/appellee.

Sharpless & Stavola, P.A., by Brenda S. McClearn, for defendant-appellants/appellees.

NEWBY, Justice.

In this case we address a claim for fraudulent concealment and the application of the statute of repose to a claim of professional negligence in the context of summary judgment. Summary judgment is proper if no genuine issue of material fact exists when viewed in the light most favorable to the nonmoving party. The record here, when viewed in that light, presents genuine issues of material fact regarding plaintiff's fraudulent concealment claim and the scope and timing of defendants' duties to plaintiff, thus making summary judgment improper in both instances. Accordingly, we affirm in part and reverse in part the decision of the Court of Appeals.

This case is currently in the summary judgment stage; thus, we review the facts in the light most favorable to plaintiff, the nonmoving party. Plaintiff Karen Head must annually file her federal tax return as well as several returns for different states. Plaintiff first hired G. Edward Towson, II, CPA (Towson) and his firm Gould Killian CPA Group, P.A. (collectively, defendants)[1] to prepare her 2005 tax returns. Defendants prepared and timely filed plaintiff's 2005 tax returns after plaintiff had provided the necessary information and signatures. Plaintiff subsequently engaged defendants for tax years 2006 through 2010. Plaintiff's federal and state tax returns for 2006, 2007, 2008, and 2009 were not filed with the various taxing authorities until 2012, however, giving rise to the present case.

On 11 and 12 August 2011, plaintiff received two notices from the Internal Revenue Service (IRS) stating that she had not filed her 2006 and 2007 tax returns. Plaintiff forwarded the notices to Towson, who responded, "I need to roll up my sleeves and sort out this mess." Towson later stated that he believed the IRS had made an error because he had provided the completed returns and filing instructions to plaintiff.

1. The record reflects that Towson, as a principal at Gould Killian, was the primary actor in the pertinent events.

On 27 September 2011, plaintiff informed Towson that she was "leaving [Towson's] accounting firm. Shortly you will be receiving information from Wayne Roddy [plaintiff's newly hired CPA] to begin the transfer of information." Nevertheless, Towson responded by expressing his intent to keep working on plaintiff's behalf: "We are almost finished with the 2010 income tax returns . . . . I will/should have them ready early next week and will call to coordinate the signing. After that, I will be happy to provide whatever is needed for Wayne Roddy." During his deposition, Towson stated that he understood this exchange to mean that plaintiff terminated him, but he continued to take action for the next twelve months in connection with plaintiff's tax matters because "[w]e were trying merely to assist with resolving the question . . . . [W]e were not her engaged CPA firm at that point." Towson did not have the 2010 returns ready as promised but did file electronically the federal return on 21 November 2011.

In response to repeated requests to transfer the information to Roddy in October and November 2011, Towson responded that they were working on "amendments" to the 2008 and 2009 tax returns, which they would complete before transferring since "it would be more difficult for [Roddy] to step into these." Later plaintiff received additional notices from the IRS for failing to file her 2006 and 2007 tax returns. Towson informed plaintiff that they would respond to and "rebut" these tax assessments and would "keep [plaintiff] up to date on the progress." Towson stated during his deposition, however, that he knew he could not speak directly with an IRS agent on plaintiff's behalf because he did not have a power of attorney from plaintiff at that point, which the IRS required.

Following more IRS notices in March 2012, Roddy directly contacted Towson, specifically noting that "[t]hese notices seem to be saying that a return was never filed for these years. . . . [W]ould it be possible to get a copy of the tax returns that were filed for these years?" In response, Towson did not acknowledge that the returns had not been filed. Instead, Towson stated that he would work with the IRS's Taxpayer Advocate Service to "personally see to it that they get the account straightened out." Additionally, Towson affirmed that they would provide copies of the 2006 and 2007 tax returns to Roddy; defendants did not provide these copies.

Throughout April 2012, Towson represented to plaintiff that he was communicating with the Taxpayer Advocate Service and working on a resolution. Towson nevertheless stated during his deposition that

defendants did not have direct communication at any point with anyone at the Taxpayer Advocate Service, and that organization likewise has no record of communications with Towson.

In July 2012, the IRS sent plaintiff a final notice of intent to levy. Towson requested that plaintiff provide a power of attorney to allow him to communicate with the IRS on her behalf, and plaintiff obliged. During August 2012, Towson used this power of attorney to communicate with the assigned revenue officer at the IRS, but Towson consistently misrepresented these communications to plaintiff. Pertinently, Towson asserted that the revenue officer had "put a hold on collection efforts" and would "help to get the account corrected" once Towson provided additional information; however, the IRS records show that the revenue officer instead communicated the IRS would seek a lien on plaintiff if the returns were not filed by 17 August 2012. On 17 August 2012, Towson requested an extension, which the IRS granted, to "re-prepare" the returns. Towson did not notify plaintiff of this extension but instead implied that the IRS needed more time to complete the necessary corrections.

On 4 September 2012, the IRS filed a lien against plaintiff. On 27 September 2012, plaintiff contacted Towson declaring her intention to "retain[ ] [legal] counsel to help resolve this matter." The same day, Towson responded: "I actually [met] with [the IRS revenue officer] today and I think the administrative remedies will resolve this." Furthermore, Towson asked that plaintiff sign 2006 and 2007 tax return signature pages, without the whole returns, "to facilitate the proper processing." Plaintiff provided the signatures on 27 September 2012. Towson replied that the revenue officer would now have everything she needed to "correct the account by re-imputing [sic] the tax return data." Again, Towson did not mention that he had not yet filed the returns nor that he intended to file the returns. Towson filed the 2006 and 2007 tax returns with the IRS on 28 September 2012. Towson later filed the 2008 and 2009 tax returns on 18 October 2012.

On 4 November 2013, plaintiff filed her complaint asserting claims against defendants for professional negligence and fraudulent concealment, and seeking compensatory and punitive damages. Plaintiff alleged defendants failed to properly prepare and file her delinquent tax returns for tax years 2006 through 2009 and intentionally deceived her about the status of the returns. On 2 May 2014, defendants unsuccessfully moved to dismiss all claims under Rules 9(b) and 12(b)(6) of the North Carolina Rules of Civil Procedure.

On 7 December 2015, defendants filed an amended motion for partial summary judgment, contending that plaintiff could not satisfy the elements of fraudulent concealment regarding the 2006 to 2009 tax returns and that the statute of repose bars the professional negligence claim for the 2006 and 2007 tax returns.[2] Regarding the fraud claim, defendants argued that plaintiff did not reasonably rely on the alleged concealment because plaintiff could have "learned the true facts by exercise of reasonable diligence," such as reading the filing instructions provided by defendants, asking if defendants had filed the returns, contacting the IRS directly, or hiring another CPA. As for the professional negligence claim, defendants argued that the four-year statute of repose began to run upon defendants' last act, which occurred six years before plaintiff filed the complaint, when defendants allegedly provided plaintiff with the filing instructions and copies of the prepared returns.

In opposition, plaintiff argued that several genuine issues of material fact existed, including the scope of the relationship, the delivery and receipt of the filing instructions and prepared returns, and whether plaintiff reasonably relied on Towson's representations. Regarding the statute of repose, plaintiff argued that the operative date for the 2006 return was 15 October 2010, the last day plaintiff could have filed the tax returns and still receive a refund. Plaintiff submitted that Towson continued to represent her in communicating with the IRS about the 2006 and 2007 tax returns and did not actually file the returns until September 2012. Because the timing and nature of the duties of the relationship remained at issue, plaintiff argued her claims related to the years 2006 and 2007 cannot be time-barred. Likewise, plaintiff claimed to present sufficient evidence of fraudulent concealment arising out of an ongoing professional relationship to create genuine issues of material fact.

On 31 December 2015, the trial court allowed defendants' motion for partial summary judgment regarding the fraudulent concealment claim for tax years 2006 through 2009, the corresponding claim for punitive damages, and defendants' statute of repose defense for professional negligence for tax years 2006 and 2007. Plaintiff appealed.

A divided panel of the Court of Appeals affirmed in part and reversed in part the trial court's order on partial summary judgment. *Head v. Gould Killian CPA Grp.*, ___ N.C. App. ___, ___, 795 S.E.2d 142, 150-51 (2016). First, the majority reversed the trial court's decision regarding the statute of repose, concluding that "whether Defendants were responsible

2. Defendants did not move for summary judgment on plaintiff's professional negligence claim relating to her 2008 and 2009 tax returns.

for delivering, mailing, or providing Plaintiff with her tax returns, and whether and when they did so" determined when the statute of repose began to run, and thus constituted genuine issues of material fact. *Id.* at ___, 795 S.E.2d at 148. Next, the court affirmed the trial court's dismissal of plaintiff's claim for fraudulent concealment because plaintiff failed to show defendants had an ongoing relationship with her and that defendants had a corresponding duty to honestly disclose information. *Id.* at ___, 795 S.E.2d at 150.

The court based its finding that defendant owed no duty to plaintiff on its view that the misrepresentations occurred "*after* Plaintiff had already terminated her employment of Defendants on 27 September 2011." *Id.* at ___, 795 S.E.2d at 150. The court explained:

> Defendants owed no *per se* fiduciary duty to Plaintiff at the time the emails were sent because Defendants had already been terminated by Plaintiff and replaced by another accountant. Furthermore, Defendants and Plaintiff were in no way "negotiating at arm's length" about "the subject matter of [a] negotiation[ ]" at the time the emails were sent.
>
> No relationship, fiduciary or otherwise, existed between the parties at that point in time, as Plaintiff had already terminated her relationship with Defendants, hired a new CPA, and was not attempting to hire or pay Defendants for any new work engagement.

Id. at ___, 795 S.E.2d at 150 (first brackets in original) (quoting *Harton v. Harton*, 81 N.C. App. 295, 298, 344 S.E.2d 117, 119, *disc. rev. denied*, 317 N.C. 703, 347 S.E.2d 41 (1986)). Affirming the trial court's grant of summary judgment on plaintiff's fraudulent concealment claim, the court likewise affirmed the grant of summary judgment on plaintiff's related claim for punitive damages. *Id.* at ___, 795 S.E.2d at 150.

The dissent rejected the majority's statute of repose analysis, instead concluding that the last act or omission regarding the "2006 and 2007 tax returns occurred on 12 December 2008, when Defendants hand delivered Plaintiff her 2007 prepared returns." *Id.* at ___, 795 S.E.2d at 151 (Enochs, J., concurring in part and dissenting in part). Thus, the four-year statute of repose barred plaintiff's claims related to these returns. *Id.* at ___, 795 S.E.2d at 152-54. Defendants filed notice of appeal based on the dissenting opinion, and plaintiff sought discretionary review as to her fraudulent concealment claim, which we allowed.

I.

Summary judgment is proper if "there is no genuine issue as to any material fact and . . . any party is entitled to a judgment as a matter of law." N.C.G.S. § 1A-1, Rule 56(c) (2017). "The movant is entitled to summary judgment . . . when only a question of law arises based on undisputed facts." *Ussery v. Branch Banking & Tr.*, 368 N.C. 325, 334, 777 S.E.2d 272, 278 (2015) (citation omitted). "All facts asserted by the [nonmoving] party are taken as true and . . . viewed in the light most favorable to that party." *Dobson v. Harris*, 352 N.C. 77, 83, 530 S.E.2d 829, 835 (2000) (citations omitted). "This Court reviews appeals from summary judgment de novo." *Ussery*, 368 N.C. at 334-35, 777 S.E.2d at 278 (citation omitted). "A genuine issue of material fact 'is one that can be maintained by substantial evidence.' " *Id.* at 335, 777 S.E.2d at 278 (quoting *Dobson*, 352 N.C. at 83, 530 S.E.2d at 835). " 'Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion' and means 'more than a scintilla or a permissible inference.' " *Id.* at 335, 777 S.E.2d at 278-79 (quoting *Thompson v. Wake Cty. Bd. of Educ.*, 292 N.C. 406, 414, 233 S.E.2d 538, 544 (1977)).

Plaintiff and defendants disagree about which party should have filed the 2006 and 2007 tax returns. Defendants produced documents allegedly demonstrating that they provided plaintiff the completed 2006 and 2007 returns as well as personalized instructions on how to file those returns. The documents contain handwritten notes by defendants indicating that defendants hand delivered the forms to plaintiff. Defendants maintain that they only file their clients' returns when specifically requested to do so, as plaintiff did for the 2005 tax returns. Plaintiff, on the other hand, stated in her deposition that she never received the completed returns or instructions from defendants. Because defendants had filed her 2005 tax return and plaintiff trusted that, as paid professionals, defendants would inform her when she needed to act, plaintiff believed defendants were likewise filing her tax returns for 2006 through 2009.

Furthermore, Towson's ongoing work for, and communication with, plaintiff throughout the disputed period of representation until the tax returns were actually filed raise genuine issues of material fact regarding the nature of the relationship between plaintiff and Towson and the corresponding duty. Thus, the claim for fraudulent concealment survives summary judgment. The parties dispute the scope of defendants' contracted-for services and what constitutes defendants' last act that triggered the running of the statute of repose. Thus, summary judgment on the application of the statute of repose under the circumstances presented here is improper as well.

II.

[1] "Fraud can . . . be broken into two categories, actual and constructive. Actual fraud is the more common type, arising from arm's length transactions." *Terry v. Terry*, 302 N.C. 77, 82, 273 S.E.2d 674, 677 (1981). Arm's-length transactions encompass "dealings between two parties who are not related or not on close terms and who are presumed to have roughly equal bargaining power; not involving a confidential relationship." [*A*]*rm's-length*, *Black's Law Dictionary* 116 (8th ed. 2007). "Transaction" read broadly encompasses an "act or an instance of conducting business or other dealings," especially "the formation, performance, or discharge of a contract." *Transaction*, *id.* at 1535. To successfully assert an allegation of actual fraud, the plaintiff must plead five elements: "(1) False representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) made with intent to deceive, (4) which does in fact deceive, (5) resulting in damage to the injured party." *Watts v. Cumberland Cty. Hosp. Sys., Inc.*, 317 N.C. 110, 116-17, 343 S.E.2d 879, 884 (1986) (quoting *Terry*, 302 N.C. at 83, 273 S.E.2d at 677). "Additionally, any reliance on the allegedly false representations must be reasonable." *Forbis v. Neal*, 361 N.C. 519, 527, 649 S.E.2d 382, 387 (2007) (citation omitted). Whether each of the elements of actual fraud and reasonable reliance are met are ordinarily questions for the jury "unless the facts are so clear that they support only one conclusion." *See id.* at 527, 649 S.E.2d at 387 (citation omitted).

"Constructive fraud arises where a confidential or fiduciary relationship exists, and its proof is less 'exacting' than that required for actual fraud." *Watts*, 317 N.C. at 115-16, 343 S.E.2d at 884 (quoting *Terry*, 302 N.C. at 83, 273 S.E.2d at 677). "When a fiduciary relation exists between parties to a transaction, equity raises a presumption of fraud when the superior party obtains a possible benefit." *Id.* at 116, 343 S.E.2d at 884 (citation omitted). To assert a cause of action for constructive fraud, the plaintiff must allege facts and circumstances "(1) which created the relation of trust and confidence, and (2) led up to and surrounded the consummation of the transaction in which defendant is alleged to have taken advantage of his position of trust to the hurt of plaintiff." *Rhodes v. Jones*, 232 N.C. 547, 549, 61 S.E.2d 725, 726 (1950).

"Though difficult to define in precise terms, a fiduciary relationship is generally described as arising when 'there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence.' " *Dallaire v. Bank of Am.*, 367 N.C. 363, 367, 760 S.E.2d 263, 266 (2014) (quoting *Green v. Freeman*, 367 N.C. 136, 141, 749 S.E.2d 262,

268 (2013) (citations omitted)). All fiduciary relationships are characterized by "a heightened level of trust and the duty of the fiduciary to act in the best interests of the other party." *Dallaire*, 367 N.C. at 367, 760 S.E.2d at 266. Specifically, a fiduciary relationship arises whenever "there is confidence reposed on one side[ ], and resulting domination and influence on the other." *Abbitt v. Gregory*, 201 N.C. 577, 598, 160 S.E. 896, 906 (1931) (quoting 25 C.J. *Fiduciary* § 9, at 1119 (1921)).

Here plaintiff's evidence, viewed in the light most favorable to plaintiff, raises genuine issues of material fact regarding the fraudulent concealment claim based on theories of both actual and constructive fraud. The record is replete with evidence that indicates an ongoing professional relationship between plaintiff and defendants until the tax returns were actually filed in September and October 2012. Despite the continued requests and inquiries from plaintiff and Roddy, defendants failed to provide the completed 2006 or 2007 tax returns for a year. Even after plaintiff notified Towson of her intent to change accountants, at Towson's request, plaintiff and Towson proceeded as if the relationship were unchanged regarding the disputed tax returns. Significantly, Towson electronically filed plaintiff's 2010 federal return on 21 November 2011, well after 27 September 2011 when plaintiff informed him she was leaving the accounting firm. Towson even requested that plaintiff execute a power of attorney to facilitate the continued representation, which she did. Furthermore, at Towson's request, plaintiff signed signature pages for the 2006 and 2007 tax returns so Towson could file them. Moreover, for months, Towson engaged in communications with the IRS on plaintiff's behalf, but falsely represented to plaintiff and Roddy the nature, frequency, and content of those conversations. Yet throughout these communications, Towson never informed plaintiff that the 2006 and 2007 tax returns were never filed, maintaining until the end that IRS processing errors caused the problems. Plaintiff continued to place trust in Towson to work with the IRS on her behalf to resolve the problems. Absent these misrepresentations, plaintiff may have been able to resolve the failure to file the returns sooner and without injury.

Taking the facts in the light most favorable to her, plaintiff has presented adequate evidence of both actual and constructive fraud to survive summary judgment. Plaintiff had an ongoing professional relationship with defendant related to the preparation and filing of her delinquent tax returns. Defendants knowingly misrepresented the status of the returns and negotiations with the IRS. The evidence could support a heightened relationship of trust needed for constructive fraud. At a minimum, even if the parties' dealings were determined to be at "arm's-length," plaintiff

has presented evidence to support her actual fraud claim. Her evidence shows she reasonably relied on Towson to perform and complete his professional services. Thus, taking the evidence in the light most favorable to the nonmoving party, genuine issues of material fact exist. Because plaintiff's claim for fraudulent concealment survives summary judgment so does her claim for punitive damages. Therefore, we reverse the decision of the Court of Appeals affirming the trial court's grant of summary judgment to defendants on plaintiff's claims for fraudulent concealment and punitive damages.

III.

[2] We next consider whether the statute of repose bars plaintiff's professional negligence claim. We have consistently recognized that a party must initiate an action within the time frame designated by a statute of repose. *E.g.*, *Hargett v. Holland*, 337 N.C. 651, 653, 447 S.E.2d 784, 786 (1994). "Unlike statutes of limitations, which run from the time a cause of action accrues, '[s]tatutes of repose . . . create time limitations which are not measured from the date of injury.' " *Id.* at 654, 447 S.E.2d at 787 (alterations in original) (quoting *Trs. of Rowan Tech. Coll. v. J. Hyatt Hammond Assocs.*, 313 N.C. 230, 234 n.3, 328 S.E.2d 274, 277 n.3 (1985)); *accord Christie v. Hartley Constr., Inc.*, 367 N.C. 534, 539, 766 S.E.2d 283, 287 (2014) ("The time of the occurrence or discovery of the plaintiff's injury is not a factor in the operation of a statute of repose.").

A statute of repose establishes "a condition precedent" which must be satisfied "for a cause of action to be recognized. If the action is not brought within the specified period, the plaintiff 'literally has no cause of action. The harm that has been done is . . . a wrong for which the law affords no redress.' " *Hargett*, 337 N.C. at 655, 447 S.E.2d at 787 (quoting *Boudreau v. Baughma*n, 322 N.C. 331, 340-41, 368 S.E.2d 849, 857 (1988) (quoting *Rosenberg v. Town of North Bergen*, 61 N.J. 190, 199, 293 A.2d 662, 667 (1972))). "Thus, the repose serves as an unyielding and absolute barrier that prevents a plaintiff's right of action even before his cause of action may accrue . . . ." *Hargett*, 337 N.C. at 655, 447 S.E.2d at 788 (quoting *Black v. Littlejohn*, 312 N.C. 626, 633, 325 S.E.2d 469, 475 (1985)). "The plaintiff has the burden of proving that a statute of repose does not defeat the claim." *Christie*, 367 N.C. at 539, 766 S.E.2d at 287 (citing *Hargett*, 337 N.C. at 654, 447 S.E.2d at 787).

For professional negligence claims, the statute of repose begins running at "the last act of the defendant giving rise to the cause of action." N.C.G.S. § 1-15(c) (2017). To determine when the last act occurred, we consider the contractual relationship between the parties and when the

contracted-for services were completed. *See Hargett*, 337 N.C. at 658, 447 S.E.2d at 789 ("[T]he contractual arrangement between attorney and client . . . determine[s] the extent of the attorney's duty to the client and the end of the attorney's professional obligation."). *Compare id.* at 655, 657-58, 447 S.E.2d at 788-89 (Attorney's contracted for duty involved simply preparing and supervising the execution of a will.), *with Sunbow Indus., Inc. v. London*, 58 N.C. App. 751, 753, 294 S.E.2d 409, 410, *disc. rev. denied*, 307 N.C. 272, 299 S.E.2d 219 (1982) (Attorney's contracted-for services imposed a duty to represent the plaintiff during closing and a continuing duty to perfect plaintiff's security interest by filing the financing statement.).

Here plaintiff presented substantial evidence raising a genuine issue of material fact regarding the scope of the parties' contractual relationship and when the corresponding last act occurred. Viewed in the light most favorable to the nonmoving party, the parties' agreement included both preparing and filing plaintiff's tax returns and negotiations with the IRS. Viewing the evidence of the contracted-for services in the light most favorable to plaintiff, defendants' last act did not occur until September 2012 when Towson filed the 2006 and 2007 returns. Additionally, plaintiff presented substantial evidence that defendants did not even prepare or complete the 2006 and 2007 tax returns until defendants filed them. Thus, because plaintiff presented substantial evidence of genuine issues of material fact regarding when the statute of repose began to run, plaintiff's professional negligence claim survives summary judgment, and we affirm the holding of the Court of Appeals on that issue.

IV.

We therefore conclude that genuine issues of material fact exist regarding the fraudulent concealment claim and the accompanying punitive damages claim, as well as the triggering event for the running of the statute of repose, and that the trial court erred in granting defendants' motion for partial summary judgment. Accordingly, the decision of the Court of Appeals is reversed in part and affirmed in part, and this case is remanded to that court for further remand to the trial court for proceedings consistent with this opinion.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

Justice BEASLEY concurring in part and dissenting in part.

I agree with the holding of the majority that there are genuine issues of material fact regarding (1) when plaintiff's professional negligence

claim accrued under the statute of repose and (2) plaintiff's fraudulent concealment claim under a theory of actual fraud. Because plaintiff failed to plead a constructive fraud theory supporting her claim for fraudulent concealment in her complaint, however, I would hold that plaintiff is procedurally barred from asserting a constructive fraud theory on remand from this Court.

While North Carolina is a "notice pleading" jurisdiction, requiring generally that complaint allegations provide a "short and plain statement of the claim sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved showing that the pleader is entitled to relief," N.C.G.S. § 1A-1, Rule 8(a)(1) (2017), plaintiff's allegations were insufficient to put defendants on notice of a constructive fraud theory supporting plaintiff's fraudulent concealment claim. Pleading standards for fraud claims under North Carolina law are even more exacting. *See id.* Rule 9(b) (2017) (requiring plaintiffs asserting fraud claims to plead "the circumstances constituting fraud . . . with particularity"). As the majority recognizes, "[t]o assert a cause of action for constructive fraud, the plaintiff must allege facts and circumstances '(1) which created the relation of trust and confidence, and (2) led up to and surrounded the consummation of the transaction in which defendant is alleged to have taken advantage of his position of trust to the hurt of plaintiff.' " *Rhodes v. Jones*, 232 N.C. 547, 549, 61 S.E.2d 725, 726 (1950). Here, plaintiff failed to plead facts *with or without* particularity supporting the existence of a relationship of trust and confidence between plaintiff and defendants: she did not plead the existence of a fiduciary relationship, or that she placed any special trust or confidence in defendants beyond that which any client places in his or her accountant, or that defendants owed her an independent duty to disclose that her returns were not filed. Instead, plaintiff pleaded that defendant Towson "concealed the fact that [her] 2006 and 2007 federal tax returns had not been filed with the IRS," that the "concealment was reasonably calculated to deceive" and "made with the intent to deceive," that she actually was deceived, and that, consequently, she was damaged by defendants' concealment. These are the classic elements of an actual fraud theory for fraudulent concealment, but they fall short of putting defendants on notice that plaintiff was claiming a constructive fraud theory.

Thus, when defendants moved for summary judgment on the plaintiff's claim for fraudulent concealment, plaintiff had no constructive fraud theory properly before the trial court. Despite defendants' repeated efforts to extinguish this would-be claim on grounds of

plaintiff's procedural default, both in their arguments before the trial court in response to plaintiff's summary judgment arguments and in their briefs to the Court of Appeals and this Court, the majority erroneously allows plaintiff to raise a new, unpleaded cause of action in response to defendant's summary judgment motion. Although I concur with the remainder of the majority's reasoning and holding, I dissent from the majority's holding that plaintiff may proceed on a constructive fraud theory of fraudulent concealment on remand.

IN THE MATTER OF A.P.

No. 145PA17

Filed 11 May 2018

Child Abuse, Dependency, and Neglect—standing to file petition—not limited to director of county DSS where juvenile resides or is found

The Court of Appeals erred by holding that the Mecklenburg County Department of Social Services, Youth and Family Division, lacked standing when it filed a petition alleging that juvenile A.P., who was living in Cabarrus County, was abused, neglected, or dependent. The legislature did not intend to limit the class of parties who may invoke the court's subject matter jurisdiction in juvenile adjudication actions only to directors of county departments of social services in the county where the juvenile at issue resides or is found.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 800 S.E.2d 77 (2017), vacating an order entered on 29 June 2016 by Judge Ty Hands in District Court, Mecklenburg County. Heard in the Supreme Court on 12 March 2018.

Matthew D. Wunsche, GAL Appellate Counsel, for appellant Guardian ad Litem, and Keith Roberson for petitioner-appellant Mecklenburg County Department of Social Services, Youth and Family Services Division.

Anné C. Wright for respondent-appellee mother.

BEASLEY, Justice.

In this case we consider whether the Juvenile Code mandates that a petition alleging a juvenile is abused, neglected, or dependent must be filed *only* by the director or authorized agent of the department of social services of the county "in which the juvenile resides or is found." Because we conclude that the legislature did not intend to constrain departments of social services in this way and because such a constraint would not be in the best interests of children or families in North Carolina, we reverse the decision of the Court of Appeals holding that the Mecklenburg County Department of Social Services, Youth and Family Division did not have standing to file the juvenile petition in this case.

A.P. was born on 2 August 2015. When A.P. was born, she lived with respondent mother (respondent) in a group home for teen mothers located in Cabarrus County. On 22 September 2015, when A.P. was less than two months old, respondent was taken to an emergency room and subsequently involuntarily committed to a mental health facility in Mecklenburg County. A social worker from Cabarrus County Department of Human Services (CCDHS) met with respondent at the hospital, and respondent agreed to a safety plan with CCDHS that provided, *inter alia*, that A.P. would live in Rowan County with Ms. B., respondent's case worker from the group home, while respondent was in the residential mental health facility.

Respondent indicated that she planned to move with A.P. to live with her grandfather in Mecklenburg County after her release from the treatment facility, and CCDHS requested that the Mecklenburg County Department of Social Services, Youth and Family Division (YFS), investigate the appropriateness of the grandfather's home for A.P.'s placement. YFS found the home appropriate. Respondent was discharged from the treatment facility on 23 October 2015, and she and A.P. moved in with respondent's grandfather. CCDHS transferred the case to YFS to provide services to respondent in Mecklenburg County. Respondent agreed to cooperate with services from YFS and reside with A.P. in her grandfather's home. According to a CCDHS employee, CCDHS "was no longer involved [with the case] after November 2, 2015."

On 25 November 2015, YFS received a report alleging that respondent was living with A.P. in an abandoned house in Mecklenburg County without heat or electricity. The report also alleged that respondent did not have food, clothing, or diapers for A.P. and that respondent was using

cocaine and marijuana. Respondent's sister took A.P. back to Ms. B.'s home in Rowan County. Ms. B. observed that A.P. had not been bathed recently and that her clothes were "very dirty." Ms. B. also found drug paraphernalia in A.P.'s diaper bag. Around 4 December 2015, respondent submitted to a substance abuse assessment at the request of YFS and tested positive for benzodiazepines and marijuana. Respondent admitted to Ms. B. that she had been living in the abandoned house and that she had used marijuana.

On 18 December 2015, respondent mother agreed that A.P. would remain with Ms. B. temporarily while respondent lived with a family friend in South Carolina. Respondent returned to Mecklenburg County in January 2016 and was later jailed in Mecklenburg County on unidentified criminal charges in February 2016. Respondent also notified YFS that she received inpatient treatment at a mental health facility in Mecklenburg County from 18 to 20 February 2016. She later indicated to a YFS social worker that she had been residing with her sister in Cabarrus County as of 22 March 2016.

On 23 March 2016, Ms. B. informed YFS that she was no longer able to provide care for A.P. YFS contacted CCDHS and requested to transfer the case back to Cabarrus County. CCDHS declined the transfer. On 29 March 2016, YFS obtained a non-secure custody order for A.P. from a Mecklenburg County magistrate and retrieved A.P. from Ms. B.'s home. The following day, YFS filed a juvenile petition with the District Court in Mecklenburg County alleging that A.P. was a neglected and dependent juvenile.

The trial court conducted a hearing on 17 May 2016 and entered an adjudication and disposition order on 29 June 2016 in which it concluded that A.P. is a neglected and dependent juvenile. At the hearing, respondent moved to dismiss the case, arguing, *inter alia*, that YFS lacked standing to file the juvenile petition under the relevant provisions of the Juvenile Code, and therefore, the trial court lacked subject matter jurisdiction to hear the case. The trial court denied respondent's motion at the hearing. Respondent appealed from the trial court's adjudication and disposition order.

The Court of Appeals held that YFS lacked standing because it was not the proper party to file the juvenile petition under N.C.G.S. § 7B-401.1(a), and it vacated the trial court's order on that basis.[1] *In re*

1. In addition to her subject matter jurisdiction argument on appeal, respondent challenged the sufficiency of evidence supporting the trial court's conclusions that A.P.

A.P., ___ N.C. App. ___, ___, ___, 800 S.E.2d 77, 80, 82 (2017). We now reverse the decision of the Court of Appeals.

Generally, "[j]urisdiction is '[t]he legal power and authority of a court to make a decision that binds the parties to any matter properly brought before it.' " *In re T.R.P.*, 360 N.C. 588, 590, 636 S.E.2d 787, 789-90 (2006) (second alteration in original) (quoting *Judicial Jurisdiction*, *Black's Law Dictionary* 856 (7th ed. 1999)). Subject matter jurisdiction, more specifically, is "the power to pass on the merits of [a] case." *Boyles v. Boyles*, 308 N.C. 488, 491, 302 S.E.2d 790, 793 (1983); *see also* 6A Strong's North Carolina Index 4th: *Courts* § 8, at 423-27 (2013) (discussing subject matter jurisdiction generally). "Subject matter jurisdiction is the indispensable foundation upon which valid judicial decisions rest, and in its absence a court has no power to act . . . ." *In re T.R.P.*, 360 N.C. at 590, 636 S.E.2d at 790.

Chapter 7B of the North Carolina General Statutes (the Juvenile Code) governs subject matter jurisdiction over abuse, neglect, and dependency actions. *E.g.*, *id.* at 591, 636 S.E.2d at 790; *see also* N.C.G.S. § 7B-200(a) (2017). Section 7B-200 provides that the district court division of the General Court of Justice[2] "has exclusive, original jurisdiction over any case involving a juvenile who is alleged to be abused, neglected, or dependent." N.C.G.S. § 7B-200(a). Once properly obtained, "jurisdiction shall continue until terminated by order of the court or until the juvenile reaches the age of 18 years or is otherwise emancipated, whichever occurs first." *Id.* § 7B-201(a) (2017). "A trial court's subject matter jurisdiction over all stages of a juvenile case is established when the action is initiated with the filing of a properly verified petition." *In re T.R.P.*, 360 N.C. at 593, 636 S.E.2d at 792 (holding that a verified petition is a prerequisite to the trial court's exercise of subject matter jurisdiction); *see also* N.C.G.S. § 7B-405 (2017) ("An action is commenced by the filing of a petition in the clerk's office when that office is open or by the acceptance of a juvenile petition by a magistrate when the clerk's office is closed, which shall constitute filing.").

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was a neglected and dependent juvenile and further argued that the Court of Appeals should have remanded the case to the trial court for additional factual inquiry regarding the applicability of the Indian Child Welfare Act. The Court of Appeals did not address these arguments because its holding that the trial court lacked subject matter jurisdiction was dispositive. *In re A.P.*, ___ N.C. App. at ___, 800 S.E.2d at 82.

2. While section 7B-200(a) states that it is "[t]he court" that has jurisdiction, the Juvenile Code defines "[c]ourt" as "[t]he district court division of the General Court of Justice." N.C.G.S. § 7B-101(6) (2017).

Respondent argues—and the Court of Appeals held—that the only party that may file a petition alleging a juvenile is abused, neglected, or dependent is the "director of the county department of social services in the county in which the juvenile resides or is found, or the director's [authorized] representative." N.C.G.S. § 7B-101(10) (2017) (defining "[d]irector" for purposes of the Juvenile Code); *see id.* § 7B-401.1(a) (2017) (providing that "[o]nly a county director of social services or the director's authorized representative may file a petition alleging that a juvenile is abused, neglected, or dependent"); *see also id.* § 7B-400(a) (2017) (providing that "[a] proceeding in which a juvenile is alleged to be abused, neglected, or dependent may be commenced in the district in which the juvenile resides or is present"). But this rigid interpretation of isolated provisions in the Juvenile Code is unsupported by the whole of the statutory text and creates jurisdictional requirements beyond those which the legislature intended to impose[3] "Perhaps no interpretive fault is more common than the failure to follow the whole-text canon, which calls on the judicial interpreter to consider the entire text, in view of its structure and of the physical and logical relation of its many parts." *N.C. Dep't of Transp. v. Mission Battleground Park, DST*, ___ N.C. ___, ___, 810 S.E.2d 217, 222 (2018) (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 167 (2012)).

When read holistically with other provisions in the Juvenile Code, the statutory sections governing "[p]arties," N.C.G.S. § 7B-401.1(a), and "[v]enue," *id.* § 7B-400(a), do not mandate dismissal of the juvenile petition in this case. Although subsection 7B-401.1(a) states that "[o]nly a county director of social services or the director's authorized representative may file a petition alleging that a juvenile is abused, neglected, or dependent," the statute does not identify *which* county director of social services must file the petition. *Id.* § 7B-401.1(a) (emphasis added). Nor does the statute limit the class of proper petitioners to only a subset of county directors of social services. *See id.* Respondent's interpretation imports the definition of "[d]irector" from N.C.G.S. § 7B-101(10) to substitute for "a county director of social services" in subsection 7B-401.1(a). But the General Assembly's use of the indefinite article, "a" before "county director of social services" in subsection 7B-401.1(a)

3. We note that at least one other unanimous panel of the Court of Appeals has, prior to this appeal, rejected arguments essentially identical to those made by respondent in this case. *See In re J.R.B.*, 182 N.C. App. 528, 642 S.E.2d 549, 2007 WL 968735, at *1-2 (2007) (unpublished) ("Respondent argues that petitioner, Stokes County Department of Social Services, did not have standing to file the action in Stokes County District Court because neither she nor the child were residing or present in Stokes County at the time of the filing of the petition. Respondent's argument, however, confuses jurisdiction with venue.").

belies the notion that the provision limits standing to any *one* county director of social services. The introductory clause for the definitions section of the Juvenile Code states that the defined words "have the listed meanings" for the purposes of the Code "*unless the context clearly requires otherwise*." N.C.G.S. § 7B-101 (emphasis added). Here, context requires otherwise.

Throughout the Juvenile Code, the legislature intentionally differentiates between references to a director of a department of social services and *a particular* director of a department of social services. *Compare* N.C.G.S. § 7B-300 (2017) (requiring "[*t*]*he director of the department of social services in each county of the State*" to establish protective services for juveniles alleged to be abused, neglected, or dependent (emphasis added)), *id.* § 7B-301 (2017) (imposing a duty to report suspicions of abuse, neglect, or dependency to "*the director of the department of social services in the county where the juvenile resides or is found*" (emphasis added)), *id.* § 7B-302 (2017) (requiring "*the director of the department of social services*" who receives a report alleging abuse, neglect, or dependency to investigate the report (emphasis added)), *id.* § 7B-307 (2017) (requiring "*the director*" to report findings of abuse, neglect, or dependency to "the district attorney" and "the appropriate local law enforcement agency" (emphasis added)), *id.* § 7B-308 (2017) (requiring a physician or facility administrator who retains custody of a juvenile pursuant to that section to notify "*the director of social services for the county in which the facility is located*" (emphasis added)), *id.* § 7B-320 (2017) (requiring "*the director*" to provide notice to an person identified as a "responsible individual" under N.C.G.S. § 7B-101(18a) after the director has completed an investigation and determined the existence of abuse or serious neglect (emphasis added)), *id.* § 7B-403 (2017) (requiring that all reports alleging a juvenile is abused, neglected, or dependent be screened by "*the director of the department of social services*" (emphasis added)), *and id.* § 7B-505.1(a) (2017) (permitting "*the director*" to "arrange for, provide, or consent to" certain medical procedures for a juvenile in the director's custody (emphasis added)), *with id.* § 7B-311(a) (2017) (requiring "county directors of social services" to furnish certain data to the Department of Health and Human Services), *id.* § 7B-324(a) (2017) (prohibiting certain persons who have been identified as a "responsible individual" under N.C.G.S. § 7B-101(18a) "by *a director*" from petitioning for judicial review of such determinations (emphasis added)), *and id.* § 7B-401.1(a) (authorizing only "*a county director of social services or the director's authorized representative*" to file a juvenile petition (emphasis added)). We presume that the legislature is capable of utilizing articles and other contextual clues to distinguish between directors of county departments

of social services *generally* and specific directors of specific county departments. *See State v. Buckner*, 351 N.C. 401, 408, 527 S.E.2d 307, 311 (2000) ("If possible, a statute must be interpreted so as to give meaning to all its provisions." (citing *State v. Bates*, 348 N.C. 29, 35, 497 S.E.2d 276, 279 (1998))); *see also Hall v. Simmons*, 329 N.C. 779, 784, 407 S.E.2d 816, 818 (1991) ("[S]ignificance and effect should, if possible, . . . be accorded every part of the act, including every section, paragraph, sentence or clause, phrase, and word." (alterations in original) (quoting *State v. Williams*, 286 N.C. 422, 432, 212 S.E.2d 113, 120 (1975))).

Other provisions of the Juvenile Code suggest that there may be instances when the party filing the juvenile petition is the director of a department of social services for a county that is not the juvenile's county of residence. *See* N.C.G.S. § 7B-400(b) (2017) ("When the director in one county conducts an assessment pursuant to G.S. 7B-302 in another county because a conflict of interest exists, the director in the county conducting the assessment may file a resulting petition in either county."); *see also id.* § 7B-302(a2) ("If the director, at any time after receiving a report that a juvenile may be abused, neglected, or dependent, determines that the juvenile's legal residence is in another county, the director shall promptly notify the director in the county of the juvenile's residence, and the two directors shall coordinate efforts to ensure that appropriate actions are taken."); *id.* § 7B-402(d) (2017) ("If the petition is filed in a county other than the county of the juvenile's residence, the petitioner shall provide a copy of the petition and any notices of hearing to the director of the department of social services in the county of the juvenile's residence.").

Because the language of section 7B-401.1(a) identifies "a county director of social services" as the proper petitioner in a juvenile adjudication action rather than "the director" (importing the definition from N.C.G.S. § 7B-101(10)) or similar language singling out particular directors, we hold that the legislature did not intend to limit the class of parties who may invoke the court's subject matter jurisdiction in juvenile adjudication actions to only directors of county departments of social services in the county where the juvenile at issue resides or is found. Respondent suggests, under her interpretation of the Juvenile Code, that YFS would have had standing in this case if it had simply asked Ms. B. to bring A.P. to Mecklenburg County before YFS filed the juvenile petition. Respondent's interpretation—tying subject matter jurisdiction to the physical location of the juvenile at the time of filing unless the petition is filed by the director of the county department of social services for the juvenile's county of residence—would permit a parent or

caretaker of a juvenile to prevent a court's otherwise proper exercise of subject matter jurisdiction simply by moving the juvenile from one county to another. Worse still, because subject matter jurisdiction "can be challenged 'at any stage of the proceedings, even after judgment,' " *Willowmere Cmty. Ass'n v. City of Charlotte*, ___ N.C. ___, ___, 809 S.E.2d 558, 564 (2018) (quoting *In re T.R.P.*, 360 N.C. at 595, 636 S.E.2d at 793), respondent's interpretation would "subject countless judgments [in juvenile cases] across North Carolina to attack for want of subject matter jurisdiction," *id.* at ___, 809 S.E.2d at 563, and needlessly delay permanency for juveniles alleged to be abused, neglected, or dependent. Our rejection of respondent's interpretation of the Juvenile Code is guided and supported by our oft-recited recognition that "the fundamental principle underlying North Carolina's approach to controversies involving child neglect and custody [is] that the best interest of the child is the polar star."[4] *In re M.A.W.*, 370 N.C. 149, 152, 804 S.E.2d 513, 516 (2017) (alteration in original) (quoting *In re Montgomery*, 311 N.C. 101, 109, 316 S.E.2d 246, 251 (1984)); *see also* N.C.G.S. § 7B-100(5) (2017) (directing courts to construe the Juvenile Code in a way that, *inter alia*, "ensur[es] that the best interests of the juvenile are of paramount consideration . . . and that when it is not in the juvenile's best interest to be returned home, the juvenile will be placed in a safe, permanent home within a reasonable amount of time").

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4. Other policy objectives that might be advanced by respondent's interpretation, such as requiring that the deciding court have sufficient connection with the parties, providing parties a convenient forum for litigation, preventing the entry of conflicting orders from duplicative proceedings, or requiring the department filing the petition to be familiar with the facts and allegations prompting intervention, are appropriately and adequately addressed by the General Assembly in other provisions in the Juvenile Code. *See* N.C.G.S. §7B-200(b) (2017) (explaining the means by which the court in a juvenile proceeding may permissibly exercise "[personal] jurisdiction over the parent, guardian, custodian, or caretaker of a juvenile who has been adjudicated abused, neglected, or dependent"); *id.* § 7B-400(c) (2017) (authorizing the court in which the proceeding is filed to change venue for good cause *without* affecting the identity of the petitioner); *id.* § 7B-200(c)(1) (2017) (staying any other civil action in North Carolina in which the juvenile's custody is at issue pending action by the court in the Chapter 7B juvenile proceeding); *id.* § 7B-200(c)(2) (2017) (providing that any properly entered order in the juvenile proceeding controls over a conflicting order entered in another civil custody action); *id.* § 7B-200(d) (2017) (permitting other civil actions to be consolidated with the juvenile proceeding and permitting the court to stay the juvenile proceeding pending the resolution of another civil action); *id.* § 7B-302(a) (requiring *the director* of the department of social services who receives a report of abuse, neglect, or dependency—rather than *all directors*—to investigate the report and determine whether services should be provided).

The record demonstrates that the juvenile petition in this case was properly verified and filed by an authorized representative of "a county director of social services." N.C.G.S. § 7B-401.1(a). Accordingly, the decision of the Court of Appeals holding otherwise is reversed, and this case is remanded to that court to address respondent's remaining arguments in this appeal.

REVERSED AND REMANDED.

IN THE MATTER OF THE ADOPTION OF C.H.M., A MINOR CHILD

No. 297PA16

Filed 11 May 2018

Adoption—father's consent—unnecessary—failure to show support

An adoption should have proceeded without the consent of the father where he did not demonstrate through an objectively verifiable record that he made the statutorily required reasonable and consistent payments for the support of the minor child before the adoption petition was filed. The father had sporadically put money into a lockbox but did not keep records.

Justice BEASLEY dissenting.

Justices HUDSON and MORGAN join in this dissenting opinion.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 788 S.E.2d 594 (2016), affirming an order entered on 9 February 2015 by Judge Debra Sasser in District Court, Wake County. Heard in the Supreme Court on 9 October 2017.

Manning, Fulton & Skinner, P.A., by Michael S. Harrell, for petitioner-appellants.

Marshall & Taylor, PLLC, by Travis R. Taylor; and Robert A. Smith for respondent-appellee.

NEWBY, Justice.

In this case we consider whether the evidence was sufficient as a matter of law to support the trial court's order requiring respondent father's consent before proceeding with the adoption of minor child C.H.M. To protect the significant interests of the child, biological parents, and adoptive parents, Chapter 48 of our General Statutes, governing adoption procedures in North Carolina, establishes clear, objective tests to determine whose consent is required before a court may grant an adoption petition. Under section 48-3-601, a putative father may unilaterally protect his paternal rights if he establishes that he has acknowledged his paternity, regularly communicated or attempted to communicate with the biological mother or minor child, and provided reasonable and consistent payments for the support of the biological mother, minor, or both, in accordance with his financial means. All of these measures must be accomplished no later than the filing of the adoption petition. As a matter of law respondent's evidence does not establish that he made reasonable and consistent payments for the support of the biological mother or minor child before the filing of the adoption petition. Because respondent failed to meet his burden of proving that he provided such support within the relevant statutory period, we conclude that the evidence is legally insufficient to support the trial court's order requiring respondent's consent. Accordingly, we reverse the decision of the Court of Appeals that affirmed the trial court's order.

From 2009 through 2012, respondent and the biological mother (Wood) had an "on and off" intimate relationship while they both lived in Illinois. In November 2012, Wood ended her relationship with respondent to resume a relationship with another man, whom she married shortly thereafter in January 2013. As respondent was aware, Wood's husband worked and resided in North Carolina, though she continued to stay in Illinois for several months. After Wood's marriage, respondent and Wood continued to communicate primarily through Facebook.

On 11 February 2013, Wood informed respondent that she was twenty weeks pregnant (or halfway through her pregnancy) with his child, but immediately told respondent to keep everything "as secret as possible." Upon learning he was the child's father, respondent told Wood he intended to "start setting money aside" for the child, but provided neither support at that time nor any details of his plan.

In March, respondent accompanied Wood to her first medical appointment and sonogram. The sonogram confirmed respondent's

understanding of the timing of Wood's pregnancy, showing she was between her second and third trimesters. While respondent expressed his enthusiasm for becoming a father and offered to pay for the office visit, Wood refused respondent's offer because her husband's insurance covered the appointment cost. Out of concern that people in their small hometown would suspect something, respondent did not buy any baby items for C.H.M. during the pregnancy. In their Facebook messages between February and July 2013, respondent and Wood's primary method of communication, respondent offered Wood his emotional support but never stated that he was actually saving money for the child. Respondent did not give Wood any monetary payments for the minor child's support, and Wood rejected respondent's various offers of financial assistance.

After consistent communication between the two throughout February and March, on 9 April 2013, Wood falsely told respondent the child might not be his, contending she had been sexually assaulted around the time of conception. Thereafter, Wood refused respondent's requests for a paternity test.

Sometime in June, Wood moved to North Carolina to join her husband, and near the end of June (around her due date), Wood stopped communicating with respondent. On 28 June 2013, Wood gave birth to C.H.M. After C.H.M.'s birth, Wood contacted an adoption agency through a social worker and thereafter provided her affidavit that the pregnancy resulted from a sexual assault by an unknown assailant. Wood and her husband, the legally presumed father, signed relinquishments placing C.H.M. with the adoption agency. Knowing nothing about the possible involvement of respondent, the agency and petitioners, who wished to adopt C.H.M., proceeded with plans to establish a home for the child. On 9 July 2013, petitioners filed the adoption petition and received eleven-day-old C.H.M. into their home, where the child has been cared for during the almost five years of her life.

Though he was aware of Wood's approximate delivery date, respondent did not attempt to contact Wood via Facebook until the end of July, a month after C.H.M.'s birth and following the adoption petition's filing. Several days later, Wood replied and met respondent during one of her return trips to Illinois, at which point he observed she was no longer pregnant. Later that evening, Wood told respondent that she had given birth to the child but that C.H.M. was still at the hospital. Finally, in September 2013, respondent contacted legal counsel about his potential paternal rights and the possibility of a paternity test. Wood told

respondent in mid-November about C.H.M.'s adoption, at which time she first informed the adoption agency about respondent. The adoption agency contacted respondent and requested a paternity test. On 4 December 2013, respondent took a paternity test, which confirmed he is the biological father.

On 23 December 2013, more than five months after the adoption petition had been filed, respondent filed his formal objection to the adoption. At the hearing on the matter in April 2014, respondent offered evidence attempting to prove that he met all the statutory requirements for his consent to be necessary, including that he had made reasonable and consistent payments for the support of the minor child, thereby entitling him to object to the adoption. Respondent testified that he had set aside money for C.H.M. in a special location in his room, a "lockbox," in which he placed funds withdrawn from ATM transactions or obtained via "cash back" purchases from Walmart. Respondent provided bank statements from 2012 and 2013, which showed some sporadic withdrawals and general purchases from Walmart, though he provided no records showing the purpose of the withdrawals. Respondent produced no receipts indicating that he received cash back from any Walmart purchases within the statutorily relevant time frame, providing only two Walmart receipts from 2014, more than six months after the statutory deadline. Throughout the hearing, respondent offered no definitive testimony on the timing of his placement of any funds, before or after the adoption petition's filing on July 9, which may have resulted in cash for the lockbox.

The lockbox that respondent produced at the April 2014 hearing then contained $3260. Respondent admitted that the placement of funds in the lockbox was sporadic and was not comprised of an "exact amount each time," as the lockbox contained "just whatever [he] could afford here and there." Because respondent did not "keep[ ] records [he did not] really know" how much he was placing in the lockbox, though he thought it was somewhere around $100 to $140 per month. Respondent did not provide any records indicating the dates of any deposits or the amount of money in the lockbox before the statutorily relevant date, 9 July 2013. Respondent stated that he made no specific designation "on paper" or elsewhere regarding the money's purpose nor did he confide in anyone about his plan or the lockbox's existence. Though respondent subpoenaed Wood, who was then back in Illinois, so she could testify, Wood did not appear at the hearing, and respondent did not present any witnesses to confirm that he had placed money in the lockbox before the adoption petition was filed.

The trial court noted that whether respondent met the statutory requirements depended on its resolution of what it deemed to be the major factual dispute in the case, "whether Respondent/Father's testimony regarding putting money aside for the minor child and Mrs. Wood is credible." Based on respondent's evidence, the trial court made the following findings:

> 7(h). During Mrs. Wood's pregnancy and after the child's birth Respondent/Father saved money on a consistent and regular basis and designated this money for the minor child. Respondent/Father also testified that he disclosed to Mrs. Wood that he was saving money for the minor child.
>
> . . . .
>
> 13(e)(1). Respondent/Father never provided any actual financial payments to Mrs. Wood or to the minor child either prior to the filing of the petition or since the filing of the petition.
>
> . . . .
>
> 13(e)(9). From the time Mrs. Wood told him that she was pregnant with his child and continuing through the time of the instant hearing, Respondent/Father made regular and consistent payments into his lock box/safe for the support of the minor child. These payments were made on a monthly (and sometimes more frequent) basis. While these funds were not deposited into a bank or other financial institution, they were deposited into a safe, and these funds were earmarked for the minor child. No other funds were deposited into this safe.
>
> 13(e)(10). At the time of the instant hearing, Respondent/Father had $3,260 in the safe.
>
> 13(e)(11). . . . Prior to the filing of the petition, Respondent/Father earned $32,000 a year from [his] employment. His annual earnings are now around $35,000. . . .
>
> 13(e)(12). Respondent/Father deposited at least $100 - $140 a month into the safe for the benefit of Ms. Wood and the child, and on average, paid approximately $225 per month in support for the minor child.

Ultimately, the trial court concluded that

> Respondent/Father's regular and consistent deposits into the safe were a reasonable method of providing support for the minor child and Mrs. Wood. His testimony regarding monthly deposits into his safe of at least $100 - $140 per month, from the time he learned of Ms. Wood's pregnancy through the instant trial is credible.

Thus, considering evidence of events both before and after the petition filing date of 9 July 2013, the trial court concluded that respondent's "reasonable method" of saving met the requirements of section 48-3-601(2)(b)(4)(II). Moreover, the trial court deemed respondent's lump sum $3260 presented at trial, his uncorroborated testimony, and his production of general bank statements as having created "a legally sufficient payment record of his efforts to provide support." As such, the trial court determined that respondent's consent was required to proceed with the adoption.

The Court of Appeals affirmed, *In re Adoption of C.H.M.*, ___ N.C. App. ___, ___, 788 S.E.2d 594, 601 (2016), opining that this Court's opinion in *In re Adoption of Anderson*, 360 N.C. 271, 624 S.E.2d 626 (2006), "did not purport to provide an exhaustive list of ways for a father to [comply with the statute], nor did it explicitly impose any sort of specific accounting requirements," *In re C.H.M.*, ___ N.C. App. at ___, 788 S.E.2d at 600. The court also determined that whether respondent had presented adequate evidence to meet the payment prong of the statute is a factual finding as opposed to a legal conclusion, making that ruling subject to a deferential standard of review on appeal. *Id.* at ___, 788 S.E.2d at 600 (citing *In re Adoption of Shuler*, 162 N.C. App. 328, 330-31, 590 S.E.2d 458, 460 (2004)). Thus, the court concluded that by considering all of respondent's evidence, in the form of his bank records, Facebook messages, and uncorroborated testimony about events before and after the adoption petition's filing, respondent produced sufficient evidence showing that he complied with the statutory requirements. *Id.* at ___, 788 S.E.2d at 600. We allowed the adoptive parents' petition for discretionary review to determine whether the trial court correctly concluded that respondent complied with the support payment requirement of section 48-3-601.

Because of a pregnancy's natural timetable and the need of a newborn to have a home, the adoption statutes provide a related window of time by which a putative father must meet clear statutory requirements that establish his paternal rights and make his consent to the adoption

necessary. These statutory requirements enumerate objective tests to ensure that all parties involved, including the biological mother, adoptive parents, adoption agency, and the courts, receive adequate notice of the father's intent to assert his paternal rights. One requirement is that a putative father provide reasonable and consistent payments for the support of the biological mother or minor child before, at the latest, the date the adoption petition is filed. Thus, by imposing objective criteria to be met by a deadline consistent with the needs of a newborn child, the statute achieves its overall purpose of providing a final and uninterrupted placement for the child.

It is undisputed that respondent had the burden of proof to establish his compliance with the statutory requirements. Even assuming, without deciding, that respondent's method of placing funds subjectively intended for the minor child in a special location in his home constitutes a statutory "payment," respondent nonetheless failed to prove that such payments met the other statutory criteria. As a matter of law, respondent's evidence was insufficient to establish that he made such payments before the statutory deadline or that each payment was reasonable and consistent in accord with his financial means during the statutory time frame.

In a trial without a jury, a trial court's findings of fact "are conclusive on appeal if there is competent evidence to support them," though "[f]indings not supported by competent evidence are not conclusive and will be set aside on appeal." *In re Estate of Skinner*, 370 N.C. 126, 139, 804 S.E.2d 449, 457-58 (2017) (alteration in original) (first quoting *Bailey v. State*, 348 N.C. 130, 146, 500 S.E.2d 54, 63 (1998); and then quoting *Penland v. Bird Coal Co.*, 246 N.C. 26, 30, 97 S.E.2d 432, 436 (1957)). "Conclusions of law drawn by the trial court from its findings of fact are reviewable *de novo* on appeal." *In re Foreclosure of Bass*, 366 N.C. 464, 467, 738 S.E.2d 173, 175 (2013) (quoting *Carolina Power & Light Co. v. City of Asheville*, 358 N.C. 512, 517, 597 S.E.2d 717, 721 (2004)).

"In distinguishing between findings of fact and conclusions of law, '[a]s a general rule, . . . any determination requiring the exercise of judgment or the application of legal principles is more properly classified a conclusion of law.' " *State v. Sparks*, 362 N.C. 181, 185, 657 S.E.2d 655, 658 (2008) (alterations in original) (quoting *In re Helms*, 127 N.C. App. 505, 510, 491 S.E.2d 672, 675 (1997) (internal citations omitted)). "[F]indings of fact [which] are essentially conclusions of law . . . will be treated as such on appeal." *Sparks*, 362 N.C. at 185, 657 S.E.2d at 658 (second and third alterations in original) (quoting *Harris v. Harris*, 51 N.C. App. 103, 107, 275 S.E.2d 273, 276, *disc. rev. denied*, 303 N.C. 180,

280 S.E.2d 452 (1981)). Moreover, determining whether sufficient evidence supports a judgment is a conclusion of law and will be reviewed as such. *See Styers v. Phillips*, 277 N.C. 460, 464, 178 S.E.2d 583, 586 (1971) ("Whether there is enough evidence to support a material issue is always a question of law for the court."); *Rountree v. Fountain*, 203 N.C. 381, 382, 166 S.E. 329, 330 (1932) ("Whether there is enough evidence to support a material issue is a matter of law.").

Chapter 48 of our General Statutes, governing adoption procedures in North Carolina, seeks

> to establish a clear judicial process for adoptions, to promote the integrity and finality of adoptions, to encourage prompt, conclusive disposition of adoption proceedings, and to structure services to adopted children, biological parents, and adoptive parents that will provide for the needs and protect the interests of all parties to an adoption, particularly adopted minors.

N.C.G.S. § 48-1-100(a) (2017). Relevant here, section 48-3-601 requires a man who "may or may not be the biological father" to consent to the adoption of the child if he

> 4. *Before the . . . filing of the petition* . . . has acknowledged his paternity of the minor and
>
> . . . .
>
> II. *Has provided*, in accordance with his financial means, *reasonable and consistent payments for the support of the biological mother during or after the term of pregnancy, or the support of the minor*, or both, which may include the payment of medical expenses, living expenses, or other tangible means of support, and has regularly visited or communicated, or attempted to visit or communicate with the biological mother during or after the term of pregnancy, or with the minor, or with both . . . .

Id. § 48-3-601(2)(b)(4)(II) (2017) (emphases added). Thus, based on the statutorily prescribed test, the putative father has the burden of proof to show, by the earlier date of a prebirth hearing or the adoption petition's filing, in addition to the other statutory requirements, that: (1) he provided payments for the support of the biological mother, minor child, or

both; (2) such payments were reasonable in light of his financial means; and (3) such payments were made consistently.

A putative father must present competent evidence showing he complied with each requirement of the statute. If he presents competent evidence that he met some but not all of the statutory requirements, his consent to the adoption is not required.[1] To protect his rights under the objective statutory test, a putative father must fulfill all statutory requirements no later than the filing of the adoption petition. *Id.* § 48-3-601(2)(b)(4) (2017). Any evidence of actions occurring after the adoption petition is filed is irrelevant, and a trial court errs as a matter of law in considering such evidence. *See In re Adoption of Byrd*, 354 N.C. 188, 197-98, 552 S.E.2d 142, 148-49 (2001).

Among the statute's support requirements, first a putative father must present evidence that he has made "payments for the support of the biological mother . . . or . . . the minor, or both." N.C.G.S. § 48-3-601(2)(b)(4)(II). Thus, a putative father must show he has provided real, tangible support through an adequate payment method. *See In re Byrd*, 354 N.C. at 196, 552 S.E.2d at 148; *see also Payment*, *Black's Law Dictionary* (10th ed. 2014) (defining payment as "[p]erformance of an obligation by the delivery of money or some other valuable thing accepted in partial or full discharge of the obligation"). Importantly, a putative father may unilaterally protect his rights, in that the "legislature's deliberate use of 'for' rather than 'to' suggests the payments contemplated by the [support provision] need not always go directly to the mother. So long as the father makes reasonable and consistent payments *for* the support of mother or child, the mother's refusal to accept assistance cannot defeat his paternal interest." *In re Anderson*, 360 N.C. at 279, 624 S.E.2d at 630.

Second, a putative father must present evidence that, during the relevant time period, he has made *reasonable* payments for the support of the biological mother, minor child, or both. *Id.* § 48-3-601(2)(b)(4)(II); *see Reasonable*, *Black's Law Dictionary* (10th ed. 2014) (defining reasonable as "[f]air, proper, or moderate under the circumstances"). A reasonable payment is calculated based upon the earnings or financial

1. This case did not involve a prebirth hearing under section 48-2-206. Given the facts of this case, this opinion will refer to the relevant deadline as the date the adoption petition was filed. In a case involving a prebirth hearing, however, the statute recognizes the deadline as "the earlier of the filing of the petition or the date of a hearing under G.S. 48-2-206." N.C.G.S. § 48-3-601(2)(b)(4) (2017). Furthermore, the statutory requirements of acknowledgement of paternity and visiting or communicating, or attempting to do so, are not at issue in this appeal.

resources of the putative father before the date of the adoption petition's filing.

Third, the statute requires that the putative father demonstrate he has made *consistent* payments. N.C.G.S. § 48-3-601(2)(b)(4)(II). To establish that his payments are consistent under the statute, the putative father must present an objectively verifiable record showing that he consistently made reasonable payments before the statutory deadline. *See The American Heritage Dictionary* 313 (2d coll. ed. 1985) (defining "consistent" as "[c]onforming to the same principles or course of action; uniform"); *see also In re Anderson*, 360 N.C. at 279, 624 S.E.2d at 631 (noting that, if the respondent had opened a bank account or established a trust fund, the biological mother's "intransigence would not have prevented him from *creating a payment record through regular deposits into the account* or trust fund in accordance with his financial resources" (emphasis added)).

Our cases recognize these express statutory requirements, as well as the need for a precise payment record to demonstrate that a putative father consistently made reasonable payments before the statutory deadline. In *In re Byrd* the respondent father delivered a $100 money order and baby clothes to a third party for the benefit of the biological mother and child, but the biological mother did not receive the items until after the adoption petition had been filed. 354 N.C. at 191, 552 S.E.2d at 145. The Court recognized that, as evident from the statutory requirements, "[t]he interests of the child and all other parties are best served by an objective test." *Id.* at 198, 552 S.E.2d at 149. Thus, the Court determined that " 'support' is best understood within the context of the statute as actual, real and tangible support, and . . . attempts or offers of support do not suffice." *Id.* at 196, 552 S.E.2d at 148. Moreover, noting the importance of the statutorily imposed deadline, the Court acknowledged that "the statute is clear in its requirements, and respondent must have satisfied the . . . prerequisites . . . prior to the filing of the adoption petition." *Id.* at 194, 552 S.E.2d at 146. The Court concluded that the respondent need not consent to the adoption proceeding because "the money order and clothes sent to [the biological mother] by respondent . . . arrived too late, as the statute specifically provides for the relevant time period to end at the filing of the adoption petition." *Id.* at 197, 552 S.E.2d at 149.

In *In re Anderson* this Court emphasized the importance of a verifiable payment record to establish that a putative father made reasonable and consistent payments. There the respondent father presented evidence that he saved money and made various offers of support,

including offers of cash to the expectant mother at school and an unsuccessful attempt to deliver an envelope containing $100 to her home. 360 N.C. at 273-74, 624 S.E.2d at 627-28. The respondent also hired an attorney who sent a letter to the expectant mother explicitly offering the respondent's financial support, indicating that the respondent had accumulated money to provide assistance to the mother and child. *Id.* at 274, 624 S.E.2d at 628. Despite the respondent's efforts, the Court concluded that, without an objectively verifiable, independent record showing that he had provided real, tangible support payments, the respondent could not establish that any alleged payments were "reasonable and consistent [as] required under the [statute]." *Id.* at 278, 624 S.E.2d at 630. The Court noted that

> [h]ere, respondent could have supplied the requisite support any number of ways, such as opening a bank account or establishing a trust fund for the benefit of [the biological mother] or their child. Had he done so, [the biological mother's] intransigence *would not have prevented him from creating a payment record through regular deposits into the account or trust fund in accordance with his financial resources*. By doing nothing more than sporadically offering support to [the biological mother], respondent left the support prong of N.C.G.S. § 48-3-601 unsatisfied and himself without standing to obstruct the adoption of [the minor child].

Id. at 279, 624 S.E.2d at 630-31 (emphasis added) (citing N.C.G.S. § 48-3-601(2)(b)(4)(II)).

Here respondent's evidence was insufficient as a matter of law to support the trial court's conclusion that respondent complied with the statutory support payment requirements. Assuming, without deciding, that respondent's actions constituted a "payment for the benefit of" the minor child, respondent failed to present any evidence that could show that, before the statutory deadline of 9 July 2013, he made reasonable and consistent payments. Respondent even admitted that any alleged deposits were not "an exact amount," and the lockbox contained "just whatever [he] could afford here and there." Respondent conceded that he did not "keep[ ] records [so he did not] really know" how much money he placed in the lockbox at any relevant time, instead, simply estimating the average amount of money he may have placed in the lockbox during a given month. Thus, respondent's evidence is insufficient as a matter of law to demonstrate that any payments were reasonable based on his income during the relevant statutory time frame.

Moreover, neither respondent's general bank statements nor the lump sum presented at trial in April 2014 provides an objectively verifiable record showing that he consistently made reasonable payments within the statutorily relevant time period. Because respondent presented no objectively verifiable, independent record to demonstrate his compliance with the statute, the trial court erred as a matter of law in concluding that respondent was required to consent to the adoption.

Significantly, at the hearing, respondent presented comingled financial evidence, which impaired the trial court's ability to identify only the statutorily relevant evidence, namely, that between 11 February 2013, when he was informed of the pregnancy, and 9 July 2013, when the petition was filed. By considering irrelevant evidence, for example, the lump sum of $3260 in the lockbox at the time of the hearing and respondent's earnings, bank records, and receipts spanning the years 2012 to 2014 as a whole, the trial court erred as a matter of law. The Court of Appeals compounded this fundamental error by affirming the trial court's order based on a deferential standard of review, which assumed that respondent's compliance with the statute constituted a purely factual matter, as opposed to a matter of law. That court likewise overlooked the trial court's error in failing to differentiate between relevant and irrelevant evidence in light of the statutory deadline.

The unusual facts of this case cannot overshadow respondent's failure to comply with the statutory requirements to establish his legal rights before the adoption petition was filed. Respondent received undisputed notice that Wood was twenty weeks pregnant with his child in February 2013 and even accompanied her to the first medical appointment which confirmed the timing of the pregnancy and likely date of delivery. Respondent knew Wood was married to another man in a different state, likely moving to that state, using her husband's insurance for medical care, acting in a deceptive and secretive manner, and denying respondent's requests for a paternity test. Given this knowledge, respondent should have recognized the pressing need to protect his paternal interest and acted accordingly. *See Eubanks v. Eubanks*, 273 N.C. 189, 197, 159 S.E.2d 562, 568 (1968) ("When a child is born in wedlock, the law presumes it to be legitimate.").

Respondent's evidence here failed to demonstrate through an objectively verifiable record that he made the statutorily required reasonable and consistent payments for the support of the minor child before the adoption petition was filed. Because respondent's evidence cannot show he complied with the objective statutory requirements, the adoption should proceed without his consent. Thus, the decision of the Court of

Appeals is reversed and this case is remanded to that court for further remand to the trial court for proceedings consistent with this opinion.

REVERSED AND REMANDED.

Justice BEASLEY dissenting.

The majority erroneously holds that the evidence in the record is insufficient to support the trial court's ruling that respondent's consent was required before proceeding with the adoption of C.H.M. because of respondent's supposed failure to demonstrate he provided reasonable support within the statutory period. *See* N.C.G.S. § 48-3-601(2)(b)(4)(II) (2017). This conclusion is in direct contradiction of the applicable standard of review: that this Court must defer to the trial court's findings of fact when those findings are based on competent evidence. Here, the trial court made voluminous factual findings establishing that respondent provided the support necessary to protect his parental rights before the filing of the adoption petition. Because there is sufficient evidence in the record to support the trial court's findings of fact and because those findings of fact support its conclusion of law that respondent provided statutorily adequate support prior to the filing of the petition, I respectfully dissent.

Before addressing the substance of the majority's opinion, I provide a more complete recitation of the facts of this case, as well as a description of the trial court's extensive findings, to better characterize respondent's efforts to protect his parental rights and the deception the birth mother inflicted on respondent during her pregnancy and after the birth of C.H.M.

The District Court, Wake County found that respondent, Venson Allen Westgate, the biological father of a child whom petitioners sought to adopt, had a legal right to require that petitioners obtain his consent to the adoption. Petitioners, Michael and Carolyn Morris, appealed to the Court of Appeals, which unanimously affirmed the trial court.

Respondent, a resident of Illinois, is the biological father of C.H.M.,[1] a child born in North Carolina on 28 June 2013. Respondent and the mother had an on-again, off-again relationship in Illinois, before the mother moved to North Carolina. The mother, who declined to

1. C.H.M. is a pseudonym to protect the identity of the juvenile pursuant to N.C. Rule of Appellate Procedure 3.1.

marry respondent, consented to the child's adoption through an agency. Respondent did not consent to the adoption. Petitioners, a Wake County couple, wish to adopt the child. To that end, on 9 July 2013, they filed a Petition for Adoption of a Minor Child in District Court, Wake County. On 23 December 2013, respondent filed a response stating his objection to the adoption.

According to respondent's filing and the trial court's findings, the mother initially told respondent she had been a victim of sexual assault and that she became pregnant as a result. Later, around 25 November 2013, the mother finally told respondent that she had lied about her sexual assault claim. Respondent contended that, although the biological mother finally agreed to respondent's request for a DNA test in November 2013, she told him she had given the child up for adoption without his knowledge. Further, respondent explained that the mother deliberately omitted respondent's name from C.H.M.'s birth certificate, as well as this adoption action, until approximately 24 November 2013. On 27 November 2013, respondent was served by the adoption agency with a Notice of Pendency of Adoption Proceedings and informed of his right to file a response to the Petition. Later, a DNA test paid for by the adoption agency confirmed that respondent is C.H.M.'s biological father.

Respondent's filing included a motion to dismiss the Petition for Adoption, in which he contended that his "lack of custody of the minor child was unknowing and involuntary" and that he "desires to become involved as the parent to the minor child." Respondent asked the court to find that his consent is required for the adoption and dismiss the Petition for Adoption. After respondent filed his response to the Petition, the matter was transferred from the clerk of court to the district court to determine if respondent's consent is necessary.

The trial court heard the matter from 23 to 25 April 2014 and entered an order in District Court, Wake County on 9 February 2015 finding that respondent's "consent is required to proceed with the adoption." The trial court's order contained extensive findings of fact relating to the nature of the relationship between respondent and the birth mother and respondent's actions during the pregnancy and after the birth of C.H.M.

The court's findings of fact relay that the entire relationship between respondent and the mother remained sporadic and that the mother effectively "controlled the relationship and was the only one to initiate break ups." Respondent did not learn that the mother had given birth until almost one month after C.H.M. was born. At the mother's request, respondent met with her in Illinois and he then realized the

mother was no longer pregnant. The meeting between respondent and the mother happened "over two weeks after the adoption petition was filed and almost one month after [the mother] placed the minor child for adoption."

The trial court also found that "[o]n November 15, 2013 [the mother] . . . finally told [respondent] about the [pending] adoption," at which point he "did everything he was asked to do in order to get a DNA test." At no point did the mother tell respondent that she had placed the child for adoption until she finally agreed to respondent's request for a DNA test in late November 2013. Before this time, she made misrepresentations to respondent that she had been the victim of sexual assault, that "she was raising the minor child with her husband," and that "the baby was in the hospital." The adoption agency did not learn that respondent might be the biological father until the mother confessed to the agency and respondent that she had lied about being sexually assaulted. The agency contacted respondent on 26 November 2013 to advise him of his right to have a paternity test.

In its order, the trial court stated that N.C.G.S. § 48-3-601 sets conditions that, if met, require a putative father's consent to an adoption. That statute reads, in pertinent part, that

> a petition to adopt a minor may be granted only if consent to the adoption has been executed by . . . the biological father of the minor . . . who . . . [1] [b]efore the . . . filing of the petition . . . has acknowledged his paternity of the minor and . . . [2] [h]as provided, in accordance with his financial means, reasonable and consistent payments for the support of the biological mother during or after the term of pregnancy, or the support of the minor, or both, which may include the payment of medical expenses, living expenses, or other tangible means of support, and [3] has regularly visited or communicated, or attempted to visit or communicate with the biological mother during or after the term of pregnancy, or with the minor, or with both . . . .

N.C.G.S. § 48-3-601(2)(b)(4) (2017).

The trial court found "that the major fact in dispute is whether [respondent's] testimony regarding putting money aside for the minor child and [the mother] is credible." The court then made findings of fact on the three statutory conditions set out above, correctly concluding

as a matter of law that respondent has met the conditions of section 48-3-601 and thus, his consent for adoption is required.

Specifically, on the second issue, the court found that respondent "provided, in accordance with his financial means, reasonable and consistent payments for the support of the biological mother during or after the term of the pregnancy, or the support of the minor, or both, which may include the payment of medical expenses, living expenses, or other tangible means of support." The court found that *during* the mother's "pregnancy and *after* the child's birth [respondent] saved money on a consistent and regular basis and designated this money for the minor child." (Emphasis added.) Moreover, respondent told the mother "that he was saving money for the minor child." The court reasoned that respondent's "never [having] provided any actual financial payments to" the mother or child, was due to the mother's continued refusal to accept such payments; in fact, respondent "wanted to buy items for the minor child," but the mother "demanded that he not tell anyone about the baby."

In direct contradiction of the majority's conclusion that there was insufficient evidence showing respondent fulfilled the support prong before the filing of the adoption petition, the trial court found that "[f]rom the time [the mother] told him that she was pregnant with his child and continuing through the time of the instant hearing, [respondent] made regular and consistent payments into his lock box/safe for the support of the minor child." The payments of around $100 to $140 "were made on a monthly (and sometimes more frequent) basis." Although respondent did not deposit the funds in a financial institution, he deposited them in a safe and "earmarked [them] for the minor child"; moreover, "[n]o other funds were deposited into this safe." In assessing the credibility of respondent's testimony regarding saving money for the benefit of the mother and C.H.M., the court stated it "gave due regard to all evidence adduced at trial" and that "[n]one of the money [respondent] deposited into the safe prior to the filing of the adoption petition was for legal fees or a DNA test." The court further found that because the mother refused to accept respondent's offers of financial support, his "regular and consistent deposits into the safe were a reasonable method of providing support for the minor child and [the mother]."

Finally, the trial court made additional findings of fact that the mother "intentionally misrepresented to the adoption agency . . . many important facts relating to the conception of this child," including that "[f]or over four months, [she] intentionally failed to disclose to the

agency that [respondent] was a possible father of the child." The court found that all these actions by the mother "prevented [respondent] from having the opportunity to fully exercise his parental rights and obligations." Moreover, the court said that "because of [the mother's] fraudulent and deceptive conduct, [respondent] was prevented from gathering the information necessary to file a custody action prior to the filing of the adoption petition."

On 5 July 2016, the Court of Appeals issued a unanimous opinion affirming the district court. The panel addressed petitioners' specific contention that respondent "failed to satisfy the statutory support requirement imposed by section 48-3-601." *In re Adoption of C.H.M.*, ___ N.C. App. ___, 788 S.E.2d 594, 597 (2016). The panel concluded that, giving due deference to the trial court's determinations of witness credibility and the weight to be given such testimony, "ample evidence . . . support[s] the district court's determination that [respondent] provided reasonable and consistent payments for the support of C.H.M. before the filing of the adoption petition." *Id.* at ___, 788 S.E.2d at 600. Moreover, the panel concluded that the trial court's "determination that [respondent's] regular and consistent deposits into his lockbox were reasonable in accordance with his financial means was adequately supported by competent evidence." *Id.* at ___, 788 S.E.2d at 601. For these reasons, the panel affirmed the district court's order. *Id.*, at ___, 788 S.E.2d at 601. This Court granted discretionary review on 16 March 2017.

The Court of Appeals correctly affirmed the trial court's ruling that respondent's consent was required to adopt C.H.M. "All proceedings under this Chapter must be heard by the court without a jury." N.C.G.S. § 48-2-202 (2017). Therefore, when the trial court acts as fact finder and judge, it must determine "whether there was competent evidence to support its findings of fact and whether its conclusions of law were proper in light of such facts." *In re Adoption of Shuler*, 162 N.C. App. 328, 330, 590 S.E.2d 458, 460 (2004) (quoting *In re Adoption of Cunningham*, 151 N.C. App. 410, 413, 567 S.E.2d 153, 155 (2002) (quoting *In re Norris*, 65 N.C. App. 269, 275, 310 S.E.2d 25, 29 (1983), *cert. denied*, 310 N.C. 744, 315 S.E.2d 703 (1984))). "[E]ven if there is evidence to the contrary," this Court is bound by the trial court's findings of fact when they are supported by competent evidence. *Id.*, at 330, 590 S.E.2d at 460 (citing *In re Adoption of Byrd*, 137 N.C. App. 623, 529 S.E.2d 465 (2000), *aff'd*, 354 N.C. 188, 552 S.E.2d 142 (2001)). "Finally, in reviewing the evidence, we defer to the trial court's determination of witnesses' credibility and the weight to be given their testimony." *Id.* at 331, 590 S.E.2d at 460 (citing *Leak v. Leak*, 129 N.C. App. 142, 150, 497 S.E.2d 702, 706, *disc.*

rev. denied, 348 N.C. 498, 510 S.E.2d 385 (1998)); *see State v. Williams*, 362 N.C. 628, 632, 669 S.E.2d 290, 294 (2008) (quoting *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982)) ("In reviewing a trial judge's findings of fact, we are 'strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law.' "); *see also Sisk v. Transylvania Cmty. Hosp., Inc.*, 364 N.C. 172, 179, 695 S.E.2d 429, 434 (2010) ("[F]indings of fact made by the trial judge are conclusive on appeal if supported by competent evidence, even if . . . there is evidence to the contrary." (first alteration in original) (quoting *Tillman v. Commercial Credit Loans, Inc.*, 362 N.C. 93, 100-01, 655 S.E.2d 362, 369 (2008) (ellipsis in original))).

The majority holds that the trial court erred in its decision by finding that respondent has met the support prong of N.C.G.S. § 48-3-601. I would hold that the Court of Appeals was correct to reject petitioners' argument and uphold the trial court's ruling. In order to satisfy the three prongs of the adoption consent statute, N.C.G.S. § 48-3-601,

> [r]espondent must have acknowledged paternity, *made reasonable and consistent support payments for the mother or child or both in accordance with his financial means*, and regularly communicated or attempted to communicate with the mother and child. Under the mandate of the statute, a putative father's failure to satisfy any of these requirements before the filing of the adoption petition would render his consent to the adoption unnecessary.

In re Byrd, 354 N.C. 188, 194, 552 S.E.2d 142, 146 (2001) (emphasis added).[2]

"The 'support' required under N.C.G.S. § 48-3-601(2)(b)(4)(II) is not specifically defined"; "however, [such] 'support' is best understood within the context of the statute as *actual*, *real and tangible support*, and . . . attempts or offers of support do not suffice." *Id.* at 196, 552 S.E.2d at 148 (emphasis added). For instance, as recognized by this Court five years later, the following facts in *In re Byrd*, this Court's seminal case on this issue, were insufficient to establish actual, real, and tangible support:

> [T]he paternal grandmother [in *In re Byrd*] offered O'Donnell, the expectant mother, a place to live and help

2. In this case, the only part of the consent statute at issue is the "support" prong.

> with medical bills and other costs, all of which O'Donnell declined. On the day O'Donnell gave birth, the putative father purchased a $100 money order for her; however, the money order did not reach O'Donnell until after the petitioners had filed for adoption.

In re Adoption of Anderson, 360 N.C. 271, 276-77, 624 S.E.2d 626, 629 (2006) (discussing and citing *In re Byrd*, 354 N.C. at 190-91, 552 S.E.2d at 144-45). This Court has stated that "attempts or offers of support, made by the putative father or another on his behalf, are not sufficient for purposes of the statute." *In re Byrd*, 354 N.C. at 197, 552 S.E.2d at 148.

Similarly, in *In re Adoption of Anderson* this Court held that numerous offers of support by the father were insufficient to show support under the adoption consent statute. 360 N.C. at 278-79, 624 S.E.2d at 630-31. Furthermore, *In re Anderson* presented additional facts showing that the putative father hired an attorney to send a letter offering financial support to the birth mother. *Id.* at 279, 624 S.E.2d at 630. In these circumstances, this Court held that the father in *In re Anderson* had not satisfied the support prong. *Id.* at 278-79, 624 S.E.2d at 630-31. In doing so, the Court in *In re Anderson* stated that "our resolution of the instant case does not grant biological mothers the power to thwart the rights of putative fathers." *Id.* at 279, 624 S.E.2d at 630. Rather, the Court upheld the legislative purpose of requiring "putative fathers to demonstrate parental responsibility with reasonable and consistent payments '*for* the support of the biological mother.' " *Id.* at 279, 624 S.E.2d at 630 (quoting N.C.G.S. § 48-3-601(2)(b)(4)(II) (2005)). Going on to explain the meaning of "for" in the context of the case, the Court concluded that

> *respondent could have supplied the requisite support any number of ways, such as opening a bank account or establishing a trust fund* for the benefit of [the mother] or their child. Had he done so, [the mother's] intransigence would not have prevented him from creating a payment record through regular deposits into the account or trust fund in accordance with his financial resources.

Id. at 279, 624 S.E.2d at 630-31 (emphasis added).

In contrast, the Court of Appeals upheld a trial court's finding that the father's consent was required in *In re Adoption of K.A.R.*, and this Court denied review. 205 N.C. App. 611, 613, 696 S.E.2d 757, 759 (2010), *disc. rev. denied*, 365 N.C. 75, 706 S.E.2d 236 (2011). In that case, the birth mother was eighteen years old, and the father was twenty years old. *Id.* at 612, 696 S.E.2d at 759. The father continually expressed a

desire to participate in the birth mother's and child's lives, even attending prenatal classes and doctor visits until the birth mother requested that he not accompany her any longer. *Id.* at 612-13, 696 S.E.2d at 759. When the birth mother became pregnant, the father was unemployed and was living with his parents. *Id.* at 612-13, 696 S.E.2d at 759. Before the child was born, the father found a job, and once he had an income, he purchased items for the baby "such as: a car seat, a baby crib mattress, and clothing worth over $200.00." *Id.* at 613, 696 S.E.2d at 759. The trial court concluded that the father provided reasonable and consistent support in accordance with his financial means as required under the statute, and the Court of Appeals affirmed the trial court's conclusion. *Id.* at 613, 696 S.E.2d at 759.

In upholding the trial court's ruling in *In re K.A.R.*, the Court of Appeals discussed the significance of the language in N.C.G.S. § 48-3-601(2)(b)(4)(II) that "obliges putative fathers to demonstrate parental responsibility with reasonable and consistent payments '*for* the support of the biological mother [. . . or the support of the minor, or both, which may include . . . other tangible means of support].' " *Id.* at 617, 696 S.E.2d at 761 (alterations in original) (quoting *In re Anderson*, 360 N.C. at 273, 624 S.E.2d at 627(quoting N.C.G.S. § 48-3-601(2)(b)(4)(II) (2005))). The Court of Appeals concluded that the deliberate "use of the word 'for' rather than 'to' suggests the legislature wanted to ensure that a putative father, who makes reasonable, consistent payments of support, could preserve his parental rights even where the biological mother refuses direct assistance." *Id.* at 617, 696 S.E.2d at 761. The Court of Appeals further explained that, in codifying N.C.G.S. § 48-3-601(2)(b)(4)(II), "the General Assembly sought 'to protect the interests and rights of men who have demonstrated paternal responsibility and to facilitate the adoption process in situations where a putative father for all intents and purposes has walked away from his responsibilities to mother and child . . . .' " *Id.* at 615, 696 S.E.2d at 760 (alteration in original) (quoting *In re Byrd*, 354 N.C. at 194, 552 S.E.2d at 146). The statute strikes a balance between these competing interests by ensuring a putative father can maintain his parental interest and by preventing a mother from unilaterally controlling the adoption process, while also allowing for certainty when a child is put up for adoption. *See id.* at 615, 696 S.E.2d at 760 (" '[A]n objective test that requires unconditional acknowledgment and tangible support' best serves the interests of all parties as well as the child.") (alteration in original) (quoting *In re Byrd*, 354 N.C. at 198, 552 S.E.2d at 149)).

As distinguished from the fathers in *In re Byrd* and *In re Anderson*, the Court of Appeals reasoned that the father in *In re K.A.R.*

"independently provided items of support for the child, even after his efforts to provide support and assistance directly to the mother were rebuffed." *Id.* at 617, 696 S.E.2d at 761. By obtaining tangible items, like clothing and a car seat, the father offered reasonable support based on his financial means, in compliance with N.C.G.S. § 48-3-601(2)(b)(4)(II). The Court of Appeals explained that this Court in "*In re Anderson* suggested one way a father could provide support independently of the mother; the father in the instant case, as determined by the trial court, has shown another." *Id.* at 617, 696 S.E.2d at 762.

Turning to this case, *In re K.A.R.* helps to support the trial court's conclusion that respondent provided the requisite support under N.C.G.S. § 48-3-601(2)(b)(4)(II). In fact, it is hard to distinguish the present facts from those of *In re K.A.R.* Unlike *In re Byrd* and *In re Anderson*, in which the respondents only made offers or attempted offers, here the trial court found that respondent actually set aside money for the benefit of C.H.M., similar to the father in *In re K.A.R.* who actually purchased items for the baby. While the majority in this case discounts respondent's evidence as "insufficient to establish the [respondent] made such payments before the statutory deadline," it is clear from the trial court's findings and this Court's precedent that respondent has indeed fulfilled the statutory requirement. Specifically, the majority finds respondent's evidence incompetent to show both that he fulfilled the support requirement before the deadline and that respondent made *reasonable* payments as required by N.C.G.S. § 48-3-601(2)(b)(4)(II). The majority is able to come to this conclusion not because respondent's evidence was in fact incompetent or insufficient, but because the majority takes issue with the type of support respondent provided—namely, saving cash in a lockbox. This is evident from the majority's requirement that respondent provide a "precise payment record." The majority makes much ado about respondent's inability to recall the exact amounts placed in the lockbox, respondent's lack of records, and respondent's lack of knowledge as to specific dates of his deposits. Ultimately, however, as already addressed earlier in this opinion, all of the majority's contentions are directly addressed and disproved by the trial court's competent findings of fact based on respondent's own testimony, bank statements, and cash back withdrawal receipts.

Furthermore, there are no specific requirements in the consent statute relating to the form that "support" must take. While the father's actions in *In re K.A.R.* are similar in kind to respondent's actions of saving money in a lockbox for the benefit of the child, our case law demonstrates a number of ways to satisfy the support requirement. While

the *In re Anderson* opinion specifically referred to bank accounts and trust funds—which surely are methods that would provide a "precise payment record"—these were only examples of possible ways to provide support. *See In re Anderson*, 360 N.C. at 279, 624 S.E.2d at 630-31. Specifically, this Court stated in *In re Anderson* that

> respondent could have supplied the requisite support *any number of ways*, *such as* opening a bank account or establishing a trust fund for the benefit of [the mother] or their child. Had he done so, [the mother's] intransigence would not have prevented him from creating a payment record through regular deposits into the account or trust fund in accordance with his financial resources.

Id. at 279, 624 S.E.2d at 630-31 (emphasis added). Therefore, the statute contemplates that some putative fathers, because of factors such as limited financial means, type of employment, and lack of access to banks, will not necessarily have the ability to establish bank accounts or trust funds.

Moreover, the plain language of N.C.G.S. § 48-3-601(2)(b)(4)(II) requires only that the putative father "[h]as provided, in accordance with his financial means, reasonable and consistent payments for the support of the biological mother during or after the term of pregnancy, or the support of the minor, or both." No language indicates what form a "payment" must take to satisfy the support prong, what method of recordkeeping (if any) must be used, or if certain forms of payment are required over others. Rather, this Court has determined that to satisfy the support prong, the putative father must provide "actual, real and tangible support, and . . . attempts or offers of support do not suffice." *In re Byrd*, 354 N.C. at 196, 552 S.E.2d at 148. As this Court has not defined the form that "actual, real and tangible support" must take, the assessment of what qualifies as actual support is a question for the trial court to determine when considering all the evidence. It is not the business of this Court to reweigh the factual evidence in the record, and that is exactly what the majority has done here.

Consequently, based on the specific evidence presented in this case, I would hold that the act of saving money in a lockbox, just as purchasing baby items in *In re K.A.R.*, is a valid method of providing support to the birth mother or child. In addition, unlike what the majority contends, the actions by respondent here, as well as those of the respondent in *In re K.A.R.*, establish reasonable support commensurate with their financial means as contemplated by N.C.G.S. § 48-3-601(2)(b)(4)(II). Possibly,

the only distinguishing characteristic between the father's actions in *In re K.A.R.* and respondent's actions here is that the purchased baby items are more readily targeted to directly benefit the child, whereas cash in a lockbox could be used for a myriad of purposes. Yet, despite the differing characteristics between the contributions made on behalf of the child, applying the proper standard of appellate review, this Court must defer to the trial court's findings of fact when those facts are based on competent evidence. Here, the trial court made extensive findings of fact,[3] ultimately finding that respondent made reasonable and consistent payments based on his financial means and earmarked the savings for the benefit of the child.[4]

Finally, this Court has been careful to stress that a birth mother should not be able to completely control the adoption process. *See In re Byrd*, 354 N.C. at 196, 552 S.E.2d at 148 ("We also believe that the General Assembly did not intend to place the mother in total control of the adoption to the exclusion of any inherent rights of the biological father."); *see also In re Anderson*, 360 N.C. at 279, 624 S.E.2d at 630 ("So long as the father makes reasonable and consistent payments for the support of mother or child, the mother's refusal to accept assistance cannot defeat his paternal interest."). This Court's decisions in *In re Byrd* and *In re Anderson* recognize that North Carolina's adoption consent statute is flexible enough to allow for a putative father to maintain his parental rights despite the birth mother's intransigence. In the present case, the birth mother essentially attempted to "thwart" respondent's efforts to provide support. As the trial court found in this case, respondent provided adequate support commensurate with his financial means. The majority's decision—reading into the statute additional requirements of record-keeping or formal accounting—is simply not supported by statute or case law. Accordingly, I would affirm the decision of the Court of Appeals, which affirmed the trial court's order requiring the father's consent for C.H.M.'s adoption.

Justices HUDSON and MORGAN join in this dissenting opinion.

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3. The trial court relied on, *inter alia*, respondent's own testimony, copies of conversations via social media between respondent and the birth mother, bank statements and receipts, and testimony from the adoption agency's personnel.

4. The trial court noted that its findings were limited by the mother's failure to respond to a subpoena to appear at the hearing. The court noted that the mother was then living out of state and was not subject to the court's power to enforce the subpoena.

IN RE HENDERSON

[371 N.C. 45 (2018)]

IN RE INQUIRY CONCERNING A JUDGE, NO. 16-231

GARY L. HENDERSON, RESPONDENT

No. 30A18

Filed 11 May 2018

Judges—failure to issue ruling or respond in a timely manner—public reprimand

Where a district court judge failed to issue a ruling for more than two years on a motion for attorney's fees and expenses, failed to respond or delayed responding to party and attorney inquiries on the status of the pending ruling, and failed to respond in a timely manner to communications from the Judicial Standards Commission's investigator regarding the status of the ruling, the Supreme Court ordered that the judge be publicly reprimanded for violations of Canons 1, 2A, 3A, and 3B of the N.C. Code of Judicial Conduct.

This matter is before the Court pursuant to N.C.G.S. §§ 7A-376 and -377 upon a recommendation by the Judicial Standards Commission entered 20 December 2017 that Respondent Gary L. Henderson, a Judge of the General Court of Justice, District Court Division 26, State of North Carolina, receive a public reprimand for conduct in violation of Canons 1, 2A, 3A(3) and (5), and 3B(1) of the North Carolina Code of Judicial Conduct and for conduct prejudicial to the administration of justice that brings the judicial office into disrepute in violation of N.C.G.S. § 7A-376. This matter was calendared for argument in the Supreme Court on 18 April 2018, but determined on the record without briefs or oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure and Rule 3 of the Rules for Supreme Court Review of Recommendations of the Judicial Standards Commission.

No counsel for Judicial Standards Commission or Respondent.

ORDER

The issue before this Court is whether District Court Judge Gary L. Henderson (Respondent) should be publicly reprimanded for violations of Canons 1, 2A, 3A, and 3B of the North Carolina Code of Judicial Conduct amounting to conduct prejudicial to the administration of justice that brings the judicial office into disrepute in violation of N.C.G.S.

§ 7A-376(b). Respondent has not challenged the findings of fact made by the Judicial Standards Commission (the Commission) or opposed the Commission's recommendation that he be publicly reprimanded by this Court.

On 2 June 2017, the Commission Counsel filed a Statement of Charges against Respondent alleging that he had engaged in conduct inappropriate to his office when he: "(1) failed to issue a ruling for more than two (2) years on a motion for attorney's fees and expenses . . . ; (2) failed to respond or delayed responding to party and attorney inquiries as to the status of the pending ruling; and (3) failed to respond in a timely manner to numerous communications from the Commission's investigator regarding the status of the ruling during the Commission's investigation into this matter."

On 20 December 2017, the Commission filed a Recommendation of Judicial Discipline, in which it made the following findings of fact:

> 1. On or about August 6, 2013, Respondent began presiding over a trial . . . to determine whether defendant Shaffer was entitled to attorney's fees and costs associated with her claims for post-separation support, permanent child custody, sanctions for purposeful delay, motion for contempt, and expert witness fees and costs. Plaintiff Zurosky was represented by attorney Tamela Wallace and defendant Shaffer was represented by attorney Amy Fiorenza. Unable to complete the hearing in a single session, the parties reconvened on April 23, 2014 and again on November 5, 2014 to conclude the trial. Respondent reserved ruling and directed the attorneys to submit written closing arguments. Attorney Fiorenza submitted the defendant's attorney's fees closing arguments, attachments and exhibits to Respondent on December 12, 2014. Attorney Wallace submitted the plaintiff's attorney's fees closing arguments to Respondent on December 19, 2014.
>
> 2. On June 15, 2015, six months after Respondent reserved judgment on the motion for attorney's fees, Attorney Fiorenza emailed Respondent inquiring as to the status of the ruling on attorney's fees, costs, and expenses. The following day, Respondent emailed the parties with apologies, noting the "matter is on my radar and it is my hope to work on it next week since court will be down for the Judge's Conference."

3. On August 28, 2015, another six weeks later, Attorney Fiorenza again contacted Respondent by email. Attorney Fiorenza asked Respondent what his estimated timeframe might be to issue a ruling and noted her client was anxious to receive a decision sometime in 2015. Respondent told Attorney Fiorenza that he did not anticipate having the order completed in 2015 because he would not have time.

4. On February 8, 2016, Attorney Fiorenza emailed Respondent a third time to inquire as to when a ruling could be expected. Respondent did not respond to this inquiry.

5. On April 7, 2016, attorney Fiorenza emailed Respondent a final time regarding the status of the decision on attorney's fees as all other matters in the case had been concluded. Attorney Fiorenza further advised Respondent that she would be forced to withdraw from the case if a decision was not soon rendered as it had been sixteen (16) months since the hearing concluded. Respondent did not respond to this inquiry.

6. Attorney Fiorenza withdrew from the case on June 6, 2016.

7. On June 20, 2016, Ms. Shaffer, now a pro se defendant, emailed Respondent, and copied the opposing attorney, to inquire when the parties could expect a decision on the attorney's fees motion heard in December 2014. Respondent did not respond. . . .

8. Having heard no response from Respondent, Ms. Shaffer emailed Chief District Court Judge Regan Miller on the morning of July 15, 2016, and copied Respondent, seeking the Chief Judge's assistance in getting a response from Respondent. Ms. Shaffer expressed her frustration with the then eighteen (18) month delay in issuing a decision in her matter. Later that morning, Chief Judge Miller forwarded Ms. Shaffer's email to Respondent. That afternoon, Respondent replied to Chief Judge Miller that he had been "dragging [his] feet" and that he had no excuses for the delay other than his "dread" of the case. Respondent at that time also committed to "making a decision soon." Respondent, however, did not respond to Ms. Shaffer or

otherwise inform the parties as to his intentions or the status of the ruling.

9. On August 26, 2016, over a month after committing to Chief Judge Miller that he would soon issue his decision, Respondent finally emailed the parties to apologize for the tardiness of his decision and informed them that he intended to issue a decision by the end of the week of September 5, 2016. Although Attorney Fiorenza had withdrawn from the case, Respondent included her in the email and notified her that she would be tasked with drafting a proposed order consistent with his anticipated ruling in early September.

10. Respondent failed to issue the ruling the week of September 5, 2016 as he had indicated to the parties and despite his commitment to Chief Judge Miller . . . that he would be "making a decision soon.". . .

11. Ms. Shaffer emailed Respondent again on October 10, 2016, imploring Respondent to issue a decision. Respondent again did not respond.

12. On November 9, 2016, Ms. Shaffer filed a complaint with the Commission regarding the delay in issuing the attorney's fees decision. . . .

. . . .

14. On January 22, 2017, Respondent emailed the attorneys with his decision, tasking attorney Fiorenza with drafting an order for Respondent in accordance with his instructions.

15. On March 15, 2017, . . . Respondent informed the Commission that the attorneys' fees order had still not been issued yet as he was waiting on the draft order from the attorneys. Pursuant to Mecklenberg County Local Rules, the Order had to be drafted by attorney Fiorenza and then provided to attorney Wallace for review and reconciliation.

16. On March 27, 2017, Respondent informed the Commission that the Order had been entered, over 2 years and 3 months after the final hearing on the motion for attorneys' fees.

(Citations omitted.) Based upon these findings of fact, the Commission concluded as a matter of law that:

> 1. Canon 1 of the Code of Judicial Conduct sets forth the broad principle that "[a] judge should uphold the integrity and independence of the judiciary." To do so, Canon 1 requires that a "judge should participate in establishing, maintaining, and enforcing, and should personally observe, appropriate standards of conduct to ensure that the integrity and independence of the judiciary shall be preserved."
>
> 2. Canon 2 of the Code of Judicial Conduct generally mandates that "[a] judge should avoid impropriety in all the judge's activities." Canon 2A specifies that "[a] judge should respect and comply with the law and should conduct himself/herself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."
>
> 3. Canon 3 of the Code of Judicial Conduct governs a judge's discharge of his or her official duties. In so doing, Canon 3A(3) requires a judge to be "patient, dignified and courteous to litigants, witnesses, lawyers and others with whom the judge deals in the judge's official capacity." Canon 3A(5) requires a judge to "dispose promptly of the business of the court." Furthermore, Canon 3B(1) requires a judge to "diligently discharge the judge's administrative responsibilities" and "maintain professional competence in judicial administration."
>
> 4. The Commission's findings of fact, as supported by the Stipulation, show that Respondent failed to issue a ruling for more than two years and three months after the last day of the hearing on the matter, and that such delay was without justification and occurred notwithstanding multiple requests to issue a ruling from the parties, the attorneys and Respondent's Chief Judge. Further, Respondent concedes that there was no excuse for the delay other than his "dread" of the case.
>
> 5. Upon the agreement of the Respondent and the Commission's independent review of the stipulated facts concerning Respondent's unreasonable and unjustified delay . . . , the Commission concludes that Respondent:

a. failed to personally observe appropriate standards of conduct necessary to ensure that the integrity of the judiciary is preserved, in violation of Canon 1 of the North Carolina Code of Judicial Conduct;

b. failed to conduct himself in a manner that promotes public confidence in the integrity of the judiciary, in violation of Canon 2A of the North Carolina Code of Judicial conduct;

c. failed to be courteous to litigants and lawyers with whom he was dealing in his official capacity, in violation of Canon 3A(3) of the North Carolina Code of Judicial Conduct;

d. failed to dispose promptly of the business of the court, in violation of Canon 3A(5) of the North Carolina Code of Judicial Conduct;

e. and failed to diligently discharge his administrative responsibilities and maintain professional competence in judicial administration in violation of Canon 3B(1) of the North Carolina Code of Judicial Conduct.

6. Upon the agreement of Respondent and the Commission's independent review of the Stipulation and the record, the Commission further concludes that Respondent's violations of the Code of Judicial Conduct amount to conduct prejudicial to the administration of justice that brings the judicial office into disrepute, in violation of N.C. Gen. Stat. § 7A-376(b).

(Brackets in original.) (Citations omitted.) Based upon these findings of fact and conclusions of law, the Commission recommended that this Court publicly reprimand Respondent. The Commission based this recommendation on its earlier findings and conclusions and the following additional dispositional determinations:

1. Respondent freely and voluntarily entered into the Stipulation to bring closure to this matter and because of his concern for protecting the integrity of the court system. Respondent understands the negative impact his actions have had on the integrity and impartiality of the judiciary.

> 2. Respondent has an excellent reputation in his community. The actions identified by the Commission as misconduct by Respondent appear to be isolated and do not form any sort of recurring pattern of misconduct.
>
> 3. Respondent has been cooperative with the Commission's investigation, voluntarily providing information about the incident and fully and openly admitting error and remorse.
>
> 4. Respondent's record of service to the judiciary, the profession and the community at large is otherwise exemplary. . . .
>
> 5. Upon reflecting upon the circumstances that brought him to this juncture, Respondent acknowledges that the conduct set out in the Stipulation establishes by clear and convincing evidence that his conduct is in violation of the North Carolina Code of Judicial Conduct and is prejudicial to the administration of justice that brings the judicial office into disrepute in violation of North Carolina General Statute § 7A-376(b). Respondent further acknowledges that the appropriate discipline in this matter is public reprimand by the North Carolina Supreme Court.
>
> 6. Pursuant to N.C. Gen. Stat. § 7A-377(a5), which requires that at least five members of the Commission concur in a recommendation of public discipline to the Supreme Court, all six Commission members present at the hearing of this matter concur in this recommendation to publicly reprimand Respondent.

(Citations and boldface type omitted.)

When reviewing a recommendation from the Commission in a judicial discipline proceeding, "the Supreme Court 'acts as a court of original jurisdiction, rather than in its typical capacity as an appellate court.' " *In re Mack*, 369 N.C. 236, 249, 794 S.E.2d 266, 273 (2016) (order) (quoting *In re Hartsfield*, 365 N.C. 418, 428, 722 S.E.2d 496, 503 (2012) (order)). In conducting an independent evaluation of the evidence, "[w]e have discretion to 'adopt the Commission's findings of fact if they are supported by clear and convincing evidence, or [we] may make [our] own findings.' " *Id.* at 249, 794 S.E.2d at 273 (quoting *In re Hartsfield*, 365 N.C. at 428, 722 S.E.2d at 503 (second and third sets of brackets in original)). "The scope of our review is to 'first determine if the Commission's findings of

fact are adequately supported by clear and convincing evidence, and in turn, whether those findings support its conclusions of law.' " *Id.* at 249, 794 S.E.2d at 274 (quoting *In re Hartsfield*, 365 N.C. at 429, 722 S.E.2d at 503).

After careful review, this Court concludes that the Commission's findings of fact, including the dispositional determinations set out above, are supported by clear, cogent, and convincing evidence in the record. In addition, we conclude that the Commission's findings of fact support its conclusions of law. Accordingly, we accept the Commission's findings and conclusions and adopt them as our own. Based upon those findings and conclusions and the recommendation of the Commission, we conclude and adjudge that Respondent should be publicly reprimanded.

Therefore, pursuant to N.C.G.S. §§ 7A-376(b) and -377(a5), it is ordered that Respondent Gary L. Henderson be PUBLICLY REPRIMANDED for violations of Canons 1, 2A, 3A, and 3B of the North Carolina Code of Judicial Conduct amounting to conduct prejudicial to the administration of justice that brings the judicial office into disrepute in violation of N.C.G.S. § 7A-376(b).

By order of the Court in Conference, this the 11th day of May, 2018.

s/Morgan, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 11th day of May, 2018.

Amy Funderburk
Clerk of the Supreme Court

s/M.C. Hackney
Assistant Clerk

IN RE JOHNSON

[371 N.C. 53 (2018)]

IN RE JUDICIAL REVIEW OF FINAL AGENCY DECISION OF THE N.C. BOARD OF CPA EXAMINERS IN THE MATTERS OF BELINDA L. JOHNSON, CPA #31871; AND BELINDA JOHNSON CPA, P.A., DATED JUNE 23, 2016

No. 214A17

Filed 11 May 2018

1. Accountants and Accounting—failure to pay for peer review—discipline by state board—constitutional

Where petitioners—a Certified Public Accountant and her firm—allegedly failed to fulfill the terms of a peer review contract by failing to pay for the peer review, and the N.C. State Board of Certified Public Accountant Examiners revoked the firm's registration for three years or until petitioners fulfilled the terms of the peer review contract, the Supreme Court rejected petitioners' argument that the Board's decision violated the N.C. Constitution by exceeding the judicial powers reasonably necessary for the agency to serve its legislative purpose. The discipline imposed by the Board, based on its determination that petitioners had entered into a peer review contract but then failed to perform the terms of that contract, was consistent with its rules and regulations and appropriate to the purpose of the agency, guided by the standards established by the General Assembly and subject to judicial review.

2. Accountants and Accounting—discipline by state board—incorrect finding on appeal by Business Court—not reversible error

Where the Business Court affirmed the final decision of the N.C. State Board of Certified Public Accountant Examiners that found petitioners had violated rules and standards promulgated by the Board and that suspended the accounting firm's registration, the Supreme Court agreed with petitioners that the Business Court erred in finding that their failure to object to testimony from an expert witness before the Board constituted a waiver of petitioners' right to raise this objection on appeal. This error, however, did not affect the result of the case, and therefore it was not reversible.

3. Accountants and Accounting—discipline by state board—petitioners' refusal to provide records—substantial evidence to support findings

Where petitioners—a Certified Public Accountant and her firm—allegedly failed to fulfill the terms of a peer review contract

by failing to pay for the peer review, and the N.C. State Board of Certified Public Accountant Examiners revoked the firm's registration for three years or until petitioners fulfilled the terms of the peer review contract, the Supreme Court rejected petitioners' argument that the Board lacked substantial evidence to support the finding that petitioners failed to comply with Government Auditing Standards and generally accepted auditing standards. The Board was unable to review petitioners' full work papers only because petitioners refused to provide them. It would undermine a fundamental purpose of a regulatory board for a regulated party to be able to escape review and disciplinary action by refusing to provide records solely in its possession.

Appeal pursuant to N.C.G.S. § 7A-27(a)(2) from an opinion and order dated 1 May 2017 entered by Judge Gregory P. McGuire, Special Superior Court Judge for Complex Business Cases, in Superior Court, Wake County, after the case was designated a mandatory complex business case by the Chief Justice pursuant to N.C.G.S. § 7A-45.4(b). Heard in the Supreme Court on 6 February 2018.

Heidgerd Law Office, LLP, by Jason E. Spain, C.D. Heidgerd, and Eric D. Edwards, for petitioner-appellants.

Allen & Pinnix, P.A., by Noel L. Allen and Nathan E. Standley; and Frank X. Trainor, III, Staff Attorney, North Carolina State Board of CPA Examiners, for respondent-appellee.

JACKSON, Justice.

In this case we consider whether the North Carolina State Board of Certified Public Accountant Examiners (the Board) can take disciplinary action against an individual or entity regulated by the Board for failure to follow a rule requiring compliance with the terms of a peer review contract. We also consider whether the Board's decision to suspend petitioners' registration in this case was made based on lawful procedure and substantial evidence. Because we conclude that the Board lawfully required a certified professional and her corporation to honor a private peer review contract and that the Board's decision was based on substantial evidence, we affirm the decision of the North Carolina Business Court affirming the Board's disciplining of petitioners.

Petitioner Belinda Johnson is a Certified Public Accountant (CPA) holding a certificate issued by the Board. Petitioner Belinda Johnson

CPA, P.A. (the Firm) is a registered certified public accounting corporation, solely owned by Johnson. On 23 June 2016, the Board issued a final decision in which it unanimously found that petitioners failed to comply with required auditing standards, failed to fulfill the terms of a peer review contract, and failed to timely respond to the Board and its staff during an investigation. The Board concluded that this conduct violated rules and standards promulgated by the Board and suspended the Firm's registration for three years or until petitioners fulfilled the terms of their peer review contract. The Board also imposed monetary penalties on Johnson, issued a five-year revocation of Johnson's CPA certificate, and stayed that revocation "provided Respondent Johnson complie[d] with all North Carolina Accountancy laws and rules during the period of the stayed revocation."

The facts underlying the Board's decision arise from a 2013 peer review of petitioners' accounting and auditing practice. In order to satisfy Board rule 21 NCAC 08M .0105(d), requiring "[p]articipation in and completion of the AICPA Peer Review Program," petitioners entered into a peer review contract with Tina Purvis of Hollingsworth Avent Averre & Purvis, PA. The peer review contract specified that Purvis would bill at a rate of $150 per hour and estimated that the peer review would take between fifteen and twenty-one hours. In part, Purvis performed a detailed review of an audit petitioners had performed for one of their not-for-profit clients (the client audit). Based upon this review, Purvis noted material departures from the relevant standards, issued a failing result, and recommended that the Firm reissue certain documents related to the client audit. Johnson disputed the results of the failed peer review before the North Carolina Association of Certified Public Accountants Peer Review Committee. After an investigation and telephone conference, the Peer Review Committee accepted Purvis's review, including the failing result.

On 30 April 2014, Purvis filed a complaint with the Board alleging that petitioners failed to fulfill the terms of the peer review contract by refusing to pay for the peer review. This complaint was forwarded to the Board's Professional Standards Committee (the committee). The committee informed Johnson that she had not complied with the peer review contract and directed petitioners to resolve the matter with Purvis by 23 October 2014. Petitioners did not resolve their dispute with Purvis and on 28 August 2015, the committee requested that petitioners submit documents related to the Purvis peer review. On 4 September 2015, Johnson sent a letter to the committee declining to send the documents because she considered the information "unnecessary and redundant" and "irrelevant and immaterial to this case."

After providing notice to petitioners, the Board held a hearing to address these matters on 19 May 2016. Petitioners were not represented by counsel at this hearing, but Johnson attended, introduced evidence, and cross-examined witnesses. On 23 June 2016, the Board issued its final decision imposing discipline on petitioners. On 22 July 2016, petitioners filed for judicial review in Superior Court, Mecklenburg County. The case was subsequently designated as a mandatory complex business case by the Chief Justice and venue was transferred to Wake County.

Petitioners were represented by counsel before the Business Court. After receiving briefs from both parties, the Business Court held a hearing and issued a written order upholding the Board's decision. The Business Court noted:

> Here, the Court's task of reviewing the Board's Order is made exceedingly difficult by the Petitioner[s'] failure to support their exceptions with references to the record evidence, or with coherent arguments or citation to legal authority. Petitioner[s'] brief consists primarily of declaratory statements that, for the most part, are not linked to any particular exception in their Petition. Nevertheless, the Court will review the Board's critical findings of fact and conclusions of law to determine whether they are supported by the evidence and free from errors of law.

In re Johnson, No. 16 CVS 12212, 2017 WL 1745650, at *4 (N.C. Super. Ct. Wake County (Bus. Ct.) May 1, 2017). After completing its review of "the Board's critical findings of fact and conclusions of law," *id.*, the Business Court affirmed the Board's decision, *id.* at *8. Petitioners appealed to this Court.

[1] On appeal, petitioners first argue that the Board's decision to revoke the Firm's registration for three years or until petitioners fulfilled the terms of the peer review contract violated the North Carolina Constitution. Maintaining that the decision effectively was an order enforcing a disputed private contract, petitioners contend that such a directive exceeded the judicial powers "reasonably necessary for the agency to serve its legislative purpose."

A claim that the agency acted in violation of constitutional provisions is reviewed de novo, with the reviewing court "consider[ing] the matter anew[ ] and freely substitut[ing] its own judgment for the agency's." *N.C. Dep't of Env't & Nat. Res. v. Carroll*, 358 N.C. 649, 659-60, 599 S.E.2d 888, 894-95 (2004) (quoting *Mann Media, Inc. v. Randolph Cty. Planning Bd.*, 356 N.C. 1, 13-14, 565 S.E.2d 9, 17 (2002)

(second alteration in original)). Our state constitution provides that "[t]he General Assembly may vest in administrative agencies established pursuant to law such judicial powers as may be reasonably necessary as an incident to the accomplishment of the purposes for which the agencies were created." N.C. Const. art. IV, § 3. To determine whether and how an administrative agency can permissibly exercise judicial power, this Court must engage in a fact-specific analysis considering "the purpose for which the agency was established and . . . the nature and extent of the judicial power undertaken to be conferred." *In re Civil Penalty*, 324 N.C. 373, 379, 379 S.E.2d 30, 34 (1989) (emphasis omitted) (quoting *State ex rel. Lanier v. Vines*, 274 N.C. 486, 497, 164 S.E.2d 161, 168 (1968)). This Court has held that when the General Assembly delegated the power to grant and revoke occupational licenses to an administrative agency, it was reasonably necessary for that agency to hold hearings and determine facts relating to the conduct of the licensee when exercising that power, but it was not permissible for that agency to exercise free discretion to impose a civil penalty of up to $25,000 on a licensee for each violation of law. *Lanier*, 274 N.C. at 497, 164 S.E.2d at 168. On the other hand, this Court has determined that the General Assembly may grant an administrative agency the discretion to impose a civil penalty when such discretion is consistent with the purpose of the agency, bound by guiding standards, and subject to judicial review. *In re Civil Penalty*, 324 N.C. at 382-83, 379 S.E.2d at 35-36.

With respect to the Board action at issue in this case, the General Assembly has delegated to the Board the authority to adopt rules of professional ethics and conduct for CPAs. N.C.G.S. § 93-12(9) (2017). Section 93-12 specifies that the Board "may formulate rules and regulations for report review and peer review" and "require remedial action by any firm with a deficiency in the review according to the rules established by the Board." *Id.* § 93-12(8c) (2017). The legislature also has authorized the Board to undertake disciplinary action in response to a "[v]iolation of any rule of professional ethics and professional conduct adopted by the Board." *Id.* § 93-12(9)(e). Subsection 93-12(9) explicitly authorizes the Board to use three forms of discipline: certificate revocation, censure, or assessment of a civil penalty not to exceed one thousand dollars. The Board is further directed to take any disciplinary action in compliance with N.C.G.S. Chapter 150B, the Administrative Procedure Act (APA). *Id.* § 93-12(9). As directed by the APA, a party "aggrieved by the final decision in a contested case . . . is entitled to judicial review of the decision." *Id.* § 150B-43 (2017).

Here petitioners challenge the legal authority of the Board to impose one disciplinary action: "Respondent Firm's registration shall be suspended for three (3) years, or until Respondent Firm provides proof satisfactory to the Board that it has fulfilled the terms of the 2013 Peer Review engagement in compliance with 21 NCAC 08N .0203(b)(4), whichever occurs first." Petitioners take the position that the Board's disciplinary action is an affirmation of a disputed debt, which is in effect a civil judgment outside the judicial powers reasonably necessary to achieve the Board's purpose; however, this is a misapprehension of the nature of the disciplinary action. The Board has not ordered petitioners to pay Purvis a particular amount. It simply determined, based in part on admissions by Johnson at the hearing, that petitioners entered into the peer review contract in accordance with 21 NCAC 08M .0105 but then failed to perform the terms of that contract. Consistent with its rules and regulations, the Board then suspended the Firm's registration for three years or until it demonstrated compliance with the rule. Because this discipline was appropriate to the purpose of the agency, guided by standards established by the General Assembly, and subject to judicial review, it was not an impermissible exercise of judicial power.

[2] Next, petitioners argue that the Business Court erred in finding that their failure to object to testimony from an expert witness before the Board constituted a waiver of petitioners' right to raise this objection on appeal. While we agree with petitioners that the Business Court erred in its reasoning, this error did not affect the result of this case, and therefore, it is not reversible error.

A challenge to an agency decision on the grounds of unlawful procedure is also reviewed de novo. *See Carroll*, 358 N.C. at 659-60, 599 S.E.2d at 894-95. Petitioners are correct insofar as "[i]t shall not be necessary for a party or his attorney to object to evidence at the hearing in order to preserve the right to object to its consideration by the agency in reaching its decision, or by the court of judicial review." N.C.G.S. § 150B-41(a) (2017). Before this Court, petitioners argue that the expert witness did not have sufficient facts to support her opinion. The gravamen of this argument is that because the expert witness did not have petitioner Johnson's complete work papers, she could not form a valid expert opinion, even though the records she did have were those petitioners had provided to the Board to demonstrate their compliance with the rules and regulations at issue in the hearing. The record shows, however, that the expert noted both that documents that a competent auditor would include were missing from the record and that some documents in the record did not meet the standards of competence. If we were to agree

with petitioners' argument that the expert could not properly testify regarding the import of documents missing from the files provided, this would not change the overall result. Petitioners' argument would only limit the evidence this Court would consider in determining if substantial evidence in the record supports the Board's determination.

[3] Finally, petitioners argue that the Board lacked substantial evidence to support the finding that petitioners failed to comply with Government Auditing Standards and generally accepted auditing standards. We disagree.

An argument that an agency action was not supported by substantial evidence is reviewed on the whole record, in which the reviewing court "examine[s] all the record evidence . . . to determine whether there is substantial evidence to justify the agency's decision." *Carroll*, 358 N.C. at 660, 559 S.E.2d at 895 (quoting *Watkins v. N.C. State Bd. of Dental Exam'rs*, 358 N.C. 190, 199, 593 S.E.2d 764, 769 (2004)). " 'Substantial evidence' is 'relevant evidence a reasonable mind might accept as adequate to support a conclusion.' " *Id.* at 660, 599 S.E.2d at 895 (quoting N.C.G.S. § 150B-2(8b) (2003)). If the expert witness testimony were not allowed, petitioners argue that it would be improper to impose disciplinary action pursuant to 21 NCAC 08N .0203 based solely on a failed peer review. But this rule neither contains the requirement proposed by petitioners nor is it the provision that the Board found petitioners had violated for failing to comply with standards. *Compare* 21 NCAC 08N .0203 (2017) *with id.* 08N .0212, .0403, *and* .0409 (2017). In fact, the Board had before it voluminous uncontested evidence to consider, including the records submitted by petitioners and the report and testimony by Purvis, as well as unchallenged testimony by the expert witness. While it is true that the Board was not in a position to review petitioners' full work papers, petitioners' refusal to provide them—an action for which petitioners were disciplined—was the only reason for this shortcoming. It would undermine a fundamental purpose of a regulatory board for a regulated party to be able to escape review and disciplinary action by refusing to provide records solely in its possession. Therefore, we conclude that the record contained sufficient evidence to support the Board's decision.

The disciplinary actions imposed by the Board and challenged by petitioners were consistent with the purpose of the agency, bound by guiding standards, and subject to judicial review. Therefore, we hold that the Board's action was not an unconstitutional exercise of judicial power. Furthermore, we hold that the Board's decision was supported

by substantial evidence notwithstanding the procedural error alleged by petitioners. Accordingly, for the foregoing reasons, we affirm the decision of the Business Court affirming the Board's imposition of disciplinary actions against petitioners.

AFFIRMED.

QUALITY BUILT HOMES INCORPORATED AND STAFFORD LAND COMPANY, INC.
v.
TOWN OF CARTHAGE

No. 315PA15-2

Filed 11 May 2018

1. Statutes of Limitation and Repose—impact fees—three-year statute of limitations

Plaintiffs' claims against a town arising from impact fees accrued when the fees where paid, not when the ordinance was passed, and the three-year statute of limitations in N.C.G.S. § 1-52(2) was applicable. Plaintiffs' last payment was more than three years after their last payment, and their claim was barred.

2. Estoppel—acceptance of benefits

In a case involving impact fees, the Town's contention that plaintiffs' claims were barred by the doctrine of estoppel by the acceptance of benefits was rejected where it did not appear that plaintiffs received any benefit from the payment of the challenged water and sewer impact fees that they would not have otherwise been entitled to receive.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished decision of the Court of Appeals, ___ N.C. App. ___, 795 S.E.2d 436 (2016), reversing and remanding an order allowing summary judgment entered on 17 October 2014 by Judge James M. Webb in Superior Court, Moore County, after the Supreme Court of North Carolina remanded the Court of Appeals' prior decision in this case, *Quality Built Homes Inc. v. Town of Carthage*, 242 N.C. App. 521, 776 S.E.2d 897 (2015) (unpublished). Heard in the Supreme Court on 9 January 2018.

Ferguson, Hayes, Hawkins & DeMay, PLLC, by James R. DeMay; and Scarbrough & Scarbrough, PLLC, by John F. Scarbrough, Madeline J. Trilling, and James E. Scarbrough, for plaintiff-appellees.

Cranfill Sumner & Hartzog LLP, by Susan K. Burkhart, for defendant-appellant.

Ellis & Winters LLP, by Stephen D. Feldman, Steven A. Scoggan, and Paul M. Cox, for North Carolina Water Quality Association and the Municipalities of Apex, Concord, Holly Springs, Jacksonville, Kannapolis, Surf City, and Winston-Salem; and F. Paul Calamita for North Carolina Water Quality Association, amici curiae.

Erwin, Bishop, Capitano & Moss, P.A., by J. Daniel Bishop and Joseph W. Moss, Jr., for Union County, amicus curiae.

ERVIN, Justice.

The issues before us in this case involve when the claims that plaintiffs Quality Built Homes Incorporated and Stafford Land Company, Inc., have asserted against defendant Town of Carthage accrued and whether plaintiffs' claims are barred by the one-, two-, three-, or ten-year statute of limitations and the doctrine of estoppel by the acceptance of benefits. After careful review of the claims asserted against the Town in plaintiffs' complaint and the applicable law, we conclude that plaintiffs' cause of action accrued upon the Town's exaction of the unlawful impact fees against plaintiffs and that plaintiffs' claims against the Town arise from a liability created by statute that is subject to the three-year statute of limitations contained in N.C.G.S. § 1-52(2). In addition, we further conclude that the Town's assertion that plaintiffs' claims are barred by the doctrine of estoppel by the acceptance of benefits lacks merit. As a result, we affirm the Court of Appeals' decision, in part; reverse the Court of Appeals' decision, in part; and remand this case to the Court of Appeals for further remand to the Superior Court, Moore County, for further proceedings not inconsistent with this opinion.

The Town operates a public water and sewer system for the benefit of its residents. In 2003, the Town adopted two ordinances providing for the assessment of water and sewer impact fees known, respectively, as Ordinance § 51.076 and Ordinance § 51.097. According to the Town, the required impact fees were to "be used to cover the cost of expanding

the water [and sewer] system[s]," with fee payments due and owing at the time of final plat approval or at the time at which the payment of a separate fee intended to cover the cost of connecting end-user customers to the Town's water and sewer system was made. As of the time that this action was commenced, Quality Built Homes had paid the Town $66,000.00 in water and sewer impact fees and placed an additional $4,000.00 into an escrow account following the filing of its complaint[1] and Stafford Land had paid the Town $57,000.00 in water and sewer impact fees.

On 28 October 2013, plaintiffs filed a complaint against the Town in the Superior Court, Moore County. In their complaint, plaintiffs asked the trial court "to determine whether [the Town] has authority to enact and enforce portions of its ordinance regulating the collection of [the water and sewer] impact fees" and sought to recover the unlawful impact fees that they had paid to the Town, plus interest, as authorized by N.C.G.S. § 160A-363(e), and attorneys' fees, as authorized by N.C.G.S. § 6-21.7. On 23 June 2014, plaintiffs amended their complaint to include claims asserting that the challenged impact fees violated the equal protection and due process provisions of the North Carolina Constitution, resulted in unreasonable discrimination in violation of N.C.G.S. § 160A-314, and contravened the Town's impact fee ordinances. On 29 August 2014, the Town filed an answer to plaintiffs' amended complaint in which it denied the material allegations of the amended complaint and asserted a number of affirmative defenses, including claims that the challenged impact fees had adequate statutory authorization and that plaintiffs' claims were barred by the applicable statute of limitations and the doctrine of waiver or estoppel through the acceptance of benefits. After the parties filed cross-motions for summary judgment, the trial court entered an order on 17 October 2014 granting summary judgment in favor of the Town. Plaintiffs noted an appeal from the trial court's order to the Court of Appeals.

On 4 August 2015, the Court of Appeals filed an unpublished opinion holding that the Town had "acted within the authority conferred by North Carolina General Statutes, sections 160A[-]312, -313, and -314 to collect a water and sewer impact fee." *Quality Built Homes Inc.*

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1. In spite of the requirement that the water and sewer impact fees be paid at the time of final plat approval, Quality Built Homes was allowed to pay these fees at the time that it received individual development permits. After the filing of plaintiffs' complaint, an additional $4,000.00 in impact fee payments made by Quality Built Homes was placed into escrow by agreement of the parties, with the final disposition of this amount to be determined at the conclusion of the present litigation.

v. Town of Carthage, 242 N.C. App. 521, 776 S.E.2d 897, 2015 WL 4620404, at *5 (2015) (unpublished). On 5 November 2015, this Court allowed discretionary review of the Court of Appeals' decision. On 19 August 2016, this Court filed an opinion reversing the Court of Appeals' decision on the grounds that the challenged impact fee ordinances were unlawful. *Quality Built Homes, Inc. v. Town of Carthage*, 369 N.C. 15, 22, 789 S.E.2d 454, 459 (2016). More specifically, we determined that, "[w]hile the enabling statutes allow [the Town] to charge for the contemporaneous use of its water and sewer systems, the plain language of the Public Enterprise Statutes clearly fails to empower the Town to impose impact fees for future services." *Id.* at 19-20, 789 S.E.2d at 458. In light of this determination, we remanded this case to the Court of Appeals in order to allow it to address whether plaintiffs' claims were barred by the applicable statute of limitations or the doctrine of estoppel by the acceptance of benefits.[2] *Id.* at 18 n.2, 22, 789 S.E.2d at 457 n.2, 459.

On 30 December 2016, the Court of Appeals filed an unpublished opinion holding that plaintiffs' claims against the Town were subject to the ten-year statute of limitations set out in N.C.G.S. § 1-56, *Quality Built Homes Inc. v. Town of Carthage*, __ N.C. App. __, 795 S.E.2d 436, 2016 WL 7984235, at *2 (2016) (unpublished), on the grounds that "North Carolina courts have held that ultra vires claims for charging fees without statutory authority have a ten-year statute of limitations," *id.* (quoting *Tommy Davis Constr. Inc. v. Cape Fear Pub. Util. Auth.*, No. 7:13-CV-2-H, 2014 WL 3345043, at *3 (E.D.N.C. July 8, 2014), *aff'd*, 807 F.3d 62 (2015)). As a result, given that plaintiffs had paid the challenged impact fees within ten years before filing their complaint in this case, the Court of Appeals held that plaintiffs' claims were not time-barred. *Id.* at *3. In addition, the Court of Appeals held that plaintiffs were not estopped from pursuing their claims against the Town on the grounds that "[o]ne cannot be estopped by accepting that which he would be legally entitled to receive in any event" and that the General Assembly "clearly contemplated that even if a party received a 'benefit' . . . in exchange for paying an illegal fee, the party should still receive a recovery of that fee." *Id.* (first alteration in original) (first quoting *Beck v. Beck*, 175 N.C. App. 519, 525, 624 S.E.2d 411, 415 (2006); and then citing N.C.G.S. § 160A-363(e)). As a result, the Court of Appeals reversed the trial court's order and remanded this case to the Superior Court, Moore County, for the purpose of "mak[ing] the appropriate findings

2. Although we had initially granted discretionary review with respect to these issues, we dismissed the discretionary review petition relating to them as having been improvidently granted. *Quality Built Homes Inc.*, 369 N.C. at 22, 789 S.E.2d at 459.

of fact as to (1) whether defendant abused its discretion making attorneys' fee mandatory and (2) a reasonable attorneys' fees award to plaintiff, whether discretionary or mandatory." *Id.* at *4. We granted the Town's request for discretionary review of the Court of Appeals' remand decision.

[1] In seeking relief from the Court of Appeals' decision before this Court, the Town argues that the Court of Appeals had ignored the fundamental legal principle that a claim accrues when the right to maintain an action arises, which, in this case, was the date upon which the challenged ordinances became effective, citing *Williams v. Blue Cross Blue Shield of North Carolina*, 357 N.C. 170, 177-78, 581 S.E.2d 415, 423 (2003). According to the Town, the "continuing wrong" doctrine has no application in this case given that, unlike the situation at issue in *Williams*, "the [p]laintiffs, in this case, who are in the business of developing property, knew at the moment the Ordinances were passed, that they would be subject to the Ordinances' requirement of the payment of water and sewer impact fees." (Emphasis omitted.) In addition, the Town argued that the "continuing wrong" doctrine has no application to ultra vires claims.

In the Town's view, the applicable statute of limitations for purposes of this case is the one-year statute of limitations set out in 1-54(10) and N.C.G.S. §§ 160A-364.1(b), which governs challenges to the validity of zoning and development ordinances. According to N.C.G.S. § 160A-364.1(b), which applies to actions "challenging the validity of any zoning or unified development ordinance or any provision thereof adopted under [Article 19, Planning and Regulation of Development]," N.C.G.S. § 160A-364.1(b) (2017), and N.C.G.S. § 1-54(10), which applies to "[a]ctions contesting the validity of any zoning or unified development ordinance or any provision thereof adopted under . . . Part 3 of Article 19 of Chapter 160A of the General Statutes," *id.* § 1-54(10) (2017), the applicable statute of limitations is one year. The Town contends that N.C.G.S. § 160A-363(e) should be harmonized and construed with N.C.G.S. § 160A-364.1(b) given that they address the same subject matter and that the two statutory provisions establish that a claim for "refund for an illegal exaction in the development process is subject to the one-year statute of limitations in N.C.G.S. § 160A-364.1(b)," citing, *inter alia*, *In re M.I.W.*, 365 N.C. 374, 382, 722 S.E.2d 469, 475 (2012).

In the alternative, the Town asserts that the two-year statute of limitations set out in N.C.G.S. § 1-53(1) operates to bar plaintiffs' claims. More specifically, the Town notes that N.C.G.S. § 1-53(1) provides that "[a]n action against a local unit of government upon a contract, obligation

or liability arising out of a contract, express or implied," must be filed within two years. N.C.G.S. § 1-53(1) (2017). The Town contends that the two-year statute of limitations set out in N.C.G.S. § 1-53(1) applies in this case because plaintiffs' claims are tantamount to a common law claim for breach of an implied contract given that a municipality's proprietary actions mirror those of a business, citing *Town of Spring Hope v. Bissette*, 305 N.C. 248, 250-51, 287 S.E.2d 851, 853 (1982) (stating that "[t]his rate-making function [pursuant to N.C.G.S. § 160A-314(a)] is a proprietary rather than a governmental one, limited only by statute or contractual agreement"). As a result, the Town contends that plaintiffs' claims, which arise from the operation of the Town's public enterprise system, should be subject to the two-year statute of limitations set out in N.C.G.S. § 1-53(1).

In the event that plaintiffs' claims are not subject to the two-year statute of limitations set out in N.C.G.S. § 1-53(1), the Town contends that the applicable statute of limitations is the three-year statute of limitations set out in N.C.G.S. § 1-52(2) applicable to "a liability created by statute," quoting N.C.G.S. § 1-52(2) (2017). According to the Town, plaintiffs' claims are subject to the three-year statute of limitations set out in N.C.G.S. § 1-52(2) because the Town's liability is authorized by N.C.G.S. § 160A-174(b) and arises from the enactment of a pair of ultra vires ordinances. In the alternative, the Town argues that, if the applicable statute of limitations is not found in N.C.G.S. § 1-52(2), this case is governed by N.C.G.S. § 1-52(5), which applies to claims "[f]or criminal conversation, or for any other injury to the person or rights of another, not arising on contract," quoting N.C.G.S. § 1-52(5) (2017).[3]

According to the Town, this Court has only applied the "catch-all" ten-year statute of limitations in cases involving resulting or constructive trusts, first citing *Orr v. Calvert*, 365 N.C. 320, 720 S.E.2d 387 (2011); then citing in the following sequence *Cline v. Cline*, 297 N.C. 336, 255 S.E.2d 399 (1979); *Jarrett v. Green*, 230 N.C. 104, 52 S.E.2d 223 (1949); Bowen v. Darden, 241 N.C. 11, 84 S.E.2d 289 (1954); *Sandlin v. Weaver*, 240 N.C. 703, 83 S.E.2d 806 (1954); and *Teachey v. Gurley*, 214 N.C. 288, 199 S.E. 83 (1938). Although the Town concedes that, even though "there

3. In its reply brief, the Town also suggested that the three-year statute of limitations applicable to claims "for the recovery of an unlawful fee, charge, or exaction collected by a county, municipality, or other unit of local government for water or sewer service or water and sewer service" set out in N.C.G.S. § 1-52(15), which had been enacted by the General Assembly after the filing of the Town's initial brief, constituted a clarifying amendment to N.C.G.S. § 1-52 and barred the maintenance of plaintiffs' claims. Act of June 29, 2017, ch. 138, secs. 10(b), 11, 2017-4 N.C. Adv. Legis. Serv. 174, 180 (LexisNexis).

may be a claim that is so unique that it bears no resemblance to any claim presently envisioned by our legislature, thereby falling outside all of the multitudinous statutes of limitations included in Chapter I, Subchapter II, Article 5, of the General Statutes, this is not such a case." (Emphases omitted.)

Finally, the Town argues that plaintiffs' claims are barred by the doctrine of estoppel by the acceptance of benefits. According to the Town, "one who voluntarily proceeds under a statute and claims benefits thereby conferred will not be heard to question its constitutionality in order to avoid its burdens." *Convent of the Sisters of St. Joseph v. City of Winston-Salem*, 243 N.C. 316, 324, 90 S.E.2d 879, 885 (1956). Allowing plaintiffs to recover the water and sewer impact fees that they have paid to the Town would permit them to receive "an unfair windfall" given that plaintiffs' developments have received needed permits and had access to the Town's water and sewer system for a period in excess of ten years and given that plaintiffs collected the impact fee amounts from their own customers as part of the price paid to purchase land in plaintiffs' developments. As a result, for all of these reasons, the Town contends that the Court of Appeals erred by remanding this case to the trial court for the entry of an order awarding attorneys' fees pursuant to N.C.G.S. § 6-21.7.

Plaintiffs, on the other hand, argue that the General Assembly's decision to rewrite N.C.G.S. § 1-52(15) to provide a three-year statute of limitations for claims "for the recovery of an unlawful fee, charge, or exaction collected by a county, municipality, or other unit of local government for water or sewer service or water and sewer service," Act of June 29, 2017, ch. 138, sec. 10(a), 2017-4 N.C. Adv. Legis. Serv. 174, 180 (LexisNexis), narrows the statute of limitations dispute in this case to whether the rewrite of N.C.G.S.§ 1-52(15) is a "clarifying amendment," which serves to bar plaintiffs' claims, or an "altering amendment" inapplicable to plaintiffs' claims, rendering the "catch-all" ten-year statute of limitations set out in N.C.G.S. § 1-56 applicable to this case. In plaintiffs' view, an amendment is deemed "altering" if it changes the substance of the original law, citing *Ray v. North Carolina Department of Transportation*, 366 N.C. 1, 9, 727 S.E.2d 675, 681 (2012), with the presumption being "that the legislature intended to change the original act by creating a new right or withdrawing any existing one," quoting *Childers v. Parker's Inc.*, 274 N.C. 256, 260, 162 S.E.2d 481, 483 (1968). Plaintiff contends, in view of the fact that N.C.G.S. § 1-52(15) required no clarification, that the subsequent amendment created an addition to, rather than a clarification of, the existing statute, rendering plaintiffs'

claims subject to the "catch-all" ten-year statute of limitations, first citing *Amward Homes Inc. v. Town of Cary*, 206 N.C. App. 38, 59, 698 S.E.2d 404, 419 (2010) (applying the ten-year statute of limitations set out in N.C.G.S. § 1-56 to a claim for the recovery of unlawful school impact fees), *a'ffd per curiam by an equally divided court*, 365 N.C. 305, 716 S.E.2d 849 (2011), then citing, *inter alia*, *Point South Properties LLC v. Cape Fear Public Utility Authority*, 243 N.C. App. 508, 515, 778 S.E.2d 284, 289 (2015) (applying the ten-year statute of limitations set out in N.C.G.S. § 1-56 to a claim for the recovery of unlawful water and sewer impact fees).

In addition, plaintiffs contend that the 2017 amendment to N.C.G.S. § 1-52(15) does not apply to this case because accrued and pending causes of action constitute vested rights, which are constitutionally protected, first citing *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 176, 594 S.E.2d 1, 12 (2004) (explaining that, "[w]ithout question, vested rights of action are property, just as tangible things are property"), then citing, *inter alia*, *Bolick v. American Barmag Corp.*, 306 N.C. 364, 371, 293 S.E.2d 415, 420 (1982) (explaining that, "[w]hen a statute would have the effect of destroying a vested right if it were applied retroactively, it will be viewed as operating prospectively only"). As a result, plaintiffs argue that the effect of retroactively applying the 2017 amendment to N.C.G.S. § 1-52(15) would deprive them of their vested property rights.

In addition, plaintiffs contend that the one-year statute of limitations set out in N.C.G.S. §§ 160A-364.1 and 1-54(10) has no application in this case because plaintiffs' claims do not stem from a zoning or unified development ordinance adopted pursuant to Article 19 of Chapter 160A of the North Carolina General Statutes. Instead, plaintiffs have challenged the validity of the water and sewer impact fees that have been charged by the Town pursuant to the public enterprise authority granted by Article 16 of Chapter 160A of the North Carolina General Statutes. Similarly, the two-year statute of limitations set out in N.C.G.S. § 1-53(1) has no application in this case because plaintiffs' claims rest upon the exaction of unlawful impact fees rather than upon the breach of an implied contract, citing *Point Southern Propertie*s, 243 N.C. App. at 515, 778 S.E.2d at 289. Moreover, plaintiffs claim that the three-year statute of limitations set out in N.C.G.S. § 1-52(2) does not apply in this case because plaintiffs' claims do not rest upon a liability created by statute. Plaintiffs argue that, instead of arising under N.C.G.S. § 160A-363(e), the Town's liability for the refund of unlawfully exacted impact fees is derived from preexisting common law principles, citing *Smith Chapel Baptist Church v. City of Durham*, 350 N.C. 805, 517 S.E.2d 874 (1999)

(requiring the refunding of unlawfully exacted stormwater impact fees paid prior to the adoption of N.C.G.S. § 153A-363(e)); and *Durham Land Owners Ass'n v. County of Durham*, 177 N.C. App. 629, 630 S.E.2d 200 (requiring the refunding of unlawfully exacted school impact fees paid prior to the adoption of N.C.G.S. § 153A-324(b), the analogous statute for counties) *disc. rev. denied*, 360 N.C. 532, 633 S.E.2d 678 (2006)). Finally, plaintiffs argue that their claims are not barred by the three-year statute of limitations set out in N.C.G.S. § 1-52(5) because their claims do not arise from an "injury to the person or rights of another, not arising on contract."

Plaintiffs assert that their claims against the Town accrued at the time of the Town's exaction of the unlawful water and sewer impact fees rather than upon the adoption of the related impact fee ordinances. The Town's argument to the contrary is flawed, in plaintiffs' opinion, because the impact fees that had been exacted from them had been adopted annually rather than in the relevant ordinances. Simply put, since a "plaintiff's injury is the wrong entitling plaintiff to commence a cause of action," quoting *Black v. Littlejohn*, 312 N.C. 626, 639, 325 S.E.2d 469, 478 (1985), plaintiffs sustained no injury until the Town actually exacted the unlawful impact fees.

Finally, plaintiffs argue that a decision to accept the Town's estoppel by the acceptance of benefits argument would encourage the Town to engage in unlawful conduct and unjustly enrich the Town. Plaintiffs contend that they received no "benefit" from the payment of the unlawful impact fees given that their payments were mandatory, citing *Virginia-Carolina Peanut Co. v. Atlantic Coast Line Railroad Co.*, 166 N.C. 62, 74, 82 S.E. 1, 5 (1914) (explaining that, in the event that a party's "only alternative [is] to submit to an illegal exaction or discontinue its business," "[m]oney paid, or rather value parted with, under such pressure has never been regarded as a voluntary act"). As a result, plaintiffs assert that the Court of Appeals' decision should be affirmed.

> Statutes of limitation are intended to afford security against stale claims. With the passage of time, memories fade or fail altogether, witnesses die or move away, [and] evidence is lost or destroyed; and it is for these reasons, and others, that statutes of limitations are inflexible and unyielding and operate without regard to the merits of a cause of action.

Estrada v. Burnham, 316 N.C. 318, 327, 341 S.E.2d 538, 544 (1986) (citation omitted), *superseded by statute*, N.C.G.S. § 1A-1, Rule 11(a) (Cum.

Supp. 1988), *on other grounds as stated in Turner v. Duke Univ.*, 325 N.C. 152, 163-64, 381 S.E.2d 706, 712-13 (1989). "[S]tatutes of limitation are procedural, not substantive, and determine not whether an injury has occurred, but whether a party can obtain a remedy for that injury." *Christie v. Hartley Constr., Inc.*, 367 N.C. 534, 538, 766 S.E.2d 283, 286 (2014) (citation omitted). "[T]he statute of limitations begins to run once a cause of action accrues," *McCutchen v. McCutchen*, 360 N.C. 280, 283, 624 S.E.2d 620, 623 (2006) (citation omitted), with "[a] cause of action [having] accrue[d] . . . whenever a party becomes liable to an action," *Matthieu v. Piedmont Nat. Gas Co.*, 269 N.C. 212, 215, 152 S.E.2d 336, 339 (1967); *see also Register v. White*, 358 N.C. 691, 697, 599 S.E.2d 549, 554 (2004) (stating that "a statutory limitations period on a cause of action necessarily cannot begin to run before a party acquires a right to maintain a lawsuit"). "The accrual of the cause of action must therefore be reckoned from the time when the first injury was sustained." *Mast v. Sapp*, 140 N.C. 533, 537, 53 S.E. 350, 351 (1906).

As we understand the record, the first issue related to the statute of limitations that must be addressed is identifying the point in time at which plaintiffs' claims against the Town accrued. In *Williams*, this Court addressed the validity of an Orange County ordinance enacted pursuant to legislation adopted by the General Assembly "authoriz[ing] transfer by the [Equal Employment Opportunity Commission] to Orange County of employment discrimination complaints filed with it originating in the county and transfer by [the Department of Housing and Urban Development] to Orange County of housing discrimination complaints arising in the county." 357 N.C. at 174-75, 581 S.E.2d at 420. After the plaintiff filed a complaint seeking relief for allegedly unlawful discrimination in violation of the ordinance, the defendant filed an answer that included a counterclaim seeking a declaration "that the enabling legislation and the Ordinance violated Article II, Section 24(1)(j) of the North Carolina Constitution." *Id.* at 177, 581 S.E.2d at 421. In holding that the defendant's challenge to the validity of the ordinance in question was not barred by the applicable statute of limitations, *id.* at 178, 581 S.E.2d at 422, predicated upon the plaintiffs' theory that "the time period for [the defendant's] filing of a constitutional challenge to the Ordinance or the enabling legislation began to run on the date the enabling legislation or the Ordinance became effective," *id.* at 178, 581 S.E.2d at 422, we explained that

> [w]hen the enabling legislation and the Ordinance were first enacted, [the defendant] was just another employer in Orange County to which these new laws applied; any harm

> to [the defendant] was both prospective and speculative. The alleged wrongs to [the defendant] became apparent only upon enforcement of the Ordinance through the filing of lawsuits and proceedings against [the defendant].

Id. at 179, 581 S.E.2d at 423. In other words, this Court held in *Williams* that the defendant's challenge to the validity of the ordinance in question accrued when the ordinance was enforced against that party rather than at the time of initial enactment in reliance upon the "continuing wrong" doctrine. *Id.* at 180-81, 581 S.E.2d at 424.

In determining whether a plaintiff is entitled to challenge the validity of an ordinance as subjecting the plaintiff to what is tantamount to a continuing harm, "we examine [the] case under a test that considers '[t]he particular policies of the statute of limitations in question, as well as the nature of the wrongful conduct and harm alleged.' " *Id.* at 179, 581 S.E.2d at 423 (second alteration in original) (quoting *Cooper v. United States*, 442 F.2d 908, 912 (7th Cir. 1971)). For that reason, the reviewing court "must examine the wrong alleged by [the plaintiff] to determine if the purported violation is the result of 'continual unlawful acts,' each of which restarts the running of the statute of limitations, or if the alleged wrong is instead merely the 'continual ill effects from an original violation.' " *Id.* at 179, 581 S.E.2d at 423 (quoting *Ward v. Caulk*, 650 F.2d 1144, 1147 (9th Cir. 1981)). "[I]f the same alleged violation was committed at the time of each act, then the limitations period begins anew with each violation . . . ." *Id.* at 179-80, 581 S.E.2d at 423 (alterations in original) (quoting *Perez v. Laredo Junior Coll.*, 706 F.2d 731, 733 (5th Cir. 1983), *cert. denied*, 464 U.S. 1042, 104 S. Ct. 708, 79 L. Ed. 2d 172 (1984)). Although the "continuing wrong" doctrine has been treated, in some instances, as an "exception" to the usual rules governing the operation of statutes of limitations, such a description of the doctrine in question is a misnomer given that the "continuing wrong" doctrine does nothing more than provide that the applicable limitations period starts anew in the event that an allegedly unlawful act is repeated.

A classic example of the "continuing wrong" doctrine can be seen in *Sample v. John L. Roper Lumber Co.*, in which the plaintiffs alleged that the defendant had repeatedly trespassed upon their property by unlawfully harvesting timber there. As this Court stated in *Sample*, "every wrong invasion of plaintiffs' property amounted to a distinct, separate trespass, day by day, and for any and all such trespasses coming within the three years the defendant is responsible." 150 N.C. 161, 166, 63 S.E. 731, 732 (1909). Thus, consistent with the principle espoused in *Williams*, 357 N.C. at 179, 581 S.E.2d at 423 (quoting *Ward*, 650 F. 2d

at 1147), the defendant's repeated trespasses onto the plaintiffs' property constituted " 'continual unlawful acts,' each of which restart[ed] the running of the statute of limitations." *See also Lightner v. City of Raleigh*, 206 N.C. 496, 503-05 174 S.E.2d 272, 276-78 (1934) (applying the continuing wrong doctrine to a situation involving repeated discharges of sewage onto the plaintiffs' property). Similarly, this Court applied the "continuing wrong" doctrine in *Faulkenbury v. Teachers' & State Employees' Retirement System of North Carolina*, in which the plaintiffs alleged that the State had unlawfully reduced their disability retirement payments. 345 N.C. 683, 690, 483 S.E.2d 422, 426 (1997). According to this Court, "the reductions in payments under the new systems were deficiencies which have continued to the present time," so that "the plaintiffs [could] pursue claims for underpayments for three years before they commenced actions," *id.* at 695, 483 S.E.2d at 429-30, given that "the limitations period beg[an] anew," *Williams*, 357 N.C. at 179-80, 581 S.E.2d at 423 (quoting *Perez*, 706 F.2d at 733), with the making of each reduced payment.

On the other hand, in *Jewell v. Price*, the plaintiffs alleged that the defendant building contractor had constructed a home for them that contained a negligently installed a furnace. The Court concluded that the "defendant's negligent breach of the legal duty . . . occurred on November 15, 1958, when he delivered to [the plaintiffs] a house with a furnace lacking a draft regulator and . . . having been installed too close to combustible joists." 264 N.C. 459, 462, 142 S.E.2d 1, 4 (1965). "[A]lthough [the plaintiffs] had no knowledge of the invasion [of their rights] until . . . . [t]he fire which destroyed their home on January 18, 1959, 'the whole injury' resulted proximately from [the] defendant's original breach of duty" "arising out of his contractual relation with [the] plaintiffs . . . when he delivered to them a house with a [negligently installed] the furnace." *Id.* at 462, 142 S.E.2d at 4. As a result, since the alleged violation of the plaintiffs' legal rights was "entire and complete," *Sample*, 150 N.C. at 164, 63 S.E. at 732, when the house containing the negligently installed furnace was delivered to the plaintiffs, there was no repeated violation of their rights sufficient to restart the running of the applicable statute of limitations at the time that the fire occurred.

The essence of plaintiffs' claim against the Town is that the Town has exacted unlawful impact fee payments from them. In other words, "the nature of the wrongful conduct and harm alleged," *Williams*, 357 N.C. at 179, 581 S.E.2d at 423 (quoting *Cooper*, 442 F.2d at 912), in plaintiffs' complaint rests upon the Town's collection of water and sewer impact fees rather than the adoption of the impact fee ordinances. As was the

case in *Williams*, plaintiffs did not sustain any direct injury at the time that the challenged impact fee ordinances were adopted. Instead, plaintiffs sustained the injury upon which their claims rest when plaintiffs were required to make impact fee payments in order to obtain approval for their development proposals. As a result, since plaintiffs' injury occurred when plaintiffs made the required impact fee payments to the Town, we conclude that Quality Built Homes' claims against the Town accrued on various dates between 1 May 2006 through 21 January 2009 and that Stafford Land's claims against the Town accrued on various dates between 20 December 2005 through 30 June 2009.

In identifying the statute of limitations that applies to plaintiffs' claims against the Town, we begin by noting that, according to well-established North Carolina law, "[w]here one of two statutes might apply to the same situation, the statute which deals more directly and specifically with the situation controls over the statute of more general applicability," *Fowler v. Valencourt*, 334 N.C. 345, 349, 435 S.E.2d 530, 533 (1993) (quoting *Trs. of Rowan Tech. Coll. v. J. Hyatt Hammond Assocs.*, 313 N.C. 230, 238, 328 S.E.2d 274, 279 (1985)), and that, "[w]hen two statutes apparently overlap, it is well established that the statute special and particular shall control over the statute general in nature, even if the general statute is more recent, unless it clearly appears that the legislature intended the general statute to control," *id.* at 349, 435 S.E.2d at 534 (quoting *Trs. of Rowan Tech.*, 313 N.C. at 238, 328 S.E.2d at 279). According to N.C.G.S. § 1-52(15), as amended by the 2017 General Assembly, an action "[f]or the recovery of taxes paid as provided in [N.C.]G.S. [§] 105-381 or for the recovery of an unlawful fee, charge, or exaction collected by a county, municipality, or other unit of local government for water or sewer service or water and sewer service" must be filed within three years from the date upon which the plaintiff's claim accrued. N.C.G.S. § 1-52(15) (2017). Although the 2017 version of N.C.G.S. § 1-52(15) "deals more directly and specifically" with the nature of the claims that plaintiffs have asserted against the Town, *Fowler*, 334 N.C. at 349, 435 S.E.2d at 533, and, although the General Assembly specifically described the 2017 addition to N.C.G.S. § 1-52(15) as "a clarifying amendment" that "has retroactive effect and applies to claims accrued or pending prior to . . . the date" that the amended version of N.C.G.S. § 1-52(15) became law, Ch. 138, sec. 11, 2017-4 N.C. Adv. Legis. Serv. at 180 (LexisNexis), we need not decide whether the amended version of N.C.G.S. § 1-52(15) is entitled to retroactive effect, despite plaintiffs' contention that they have a vested property right in their claims against the Town, given our determination that plaintiffs' claims against

the Town are governed by N.C.G.S. § 1-52(2), which applies to "a liability created by statute, either state or federal."

The gravamen of our previous decision in this case was that "the Public Enterprise Statutes . . . clearly and unambiguously fail to give [the Town] the essential prospective charging power necessary to assess impact fees" and that, since "the legislature alone controls the extension of municipal authority, the impact fee ordinances on their face exceed the powers delegated to the Town by the General Assembly." *Quality Built Homes*, 369 N.C. at 22, 789 S.E.2d at 459. As a result, the essence of our earlier decision in this case was that the Town had acted unlawfully by assessing a water and sewer impact fee not authorized by N.C.G.S. § 160A-314(a) (2015) (providing that "[a] city may establish and revise . . . rents, rates, fees, charges, and penalties for the use of or the services furnished by any public enterprise"). In light of that fact, we have little difficulty concluding that the claim recognized in our prior decision in this case was, when viewed realistically, one resting upon an alleged statutory violation that resulted in the exaction of an unlawful payment which plaintiffs had an inherent right to recoup.[4] Although the Court of Appeals reached a different conclusion in *Point South Properties* based upon the fact that N.C.G.S. § 162A-88 did not provide an explicit statutory right to seek recovery of the challenged impact fees separate and apart from the statutory provisions governing the defendant's authority to charge the challenged impact fees, we do not believe that the applicability of the three-year statute of limitations set out in N.C.G.S. § 1-52(2) hinges upon such a fine parsing of the relevant statutory language.[5] At an absolute minimum, none of our prior decisions impose the limitation upon the applicability of the three-year statute of limitations set out in N.C.G.S. § 1-52(2) upon which the Court of Appeals' decisions in *Point South Properties* and this case depend. *See Town of Morganton v. Avery*, 179 N.C. 551, 552, 103 S.E. 138, 139 (1920) (applying the three-year statute of limitations for liability created by statute to an action to enforce a lien allegedly arising from a tax assessment on the grounds that, "[w]ithout the creative force of the statute, the charge upon the land could not be made"); *Shackelford v. Staton*, 117 N.C. 73, 75, 23 S.E. 101,

4. In light of this determination, we need not decide whether the monetary payments that the Town exacted from plaintiffs constituted "a tax, fee, or monetary contribution for development or a development permit not specifically authorized by law." N.C.G.S. § 160A-363(e) (2017).

5. Given that determination, we overrule the Court of Appeals' decision with respect to the applicability of the three-year statute of limitations set out in N.C.G.S. § 1-52(2) in *Point South Properties*.

102 (1895) (applying the three-year statute of limitations for liability created by statute in a case arising from the failure of a Clerk of Superior Court to properly index a judgment). As a result, we conclude that the three-year statute of limitations for liabilities set out in N.C.G.S. § 1-52(2)[6] applies in this case.[7] Moreover, given that plaintiffs' claims against the Town accrued between 20 December 2005 and 30 June 2009 and given that plaintiffs filed their complaint against the Town more than three years after the Town exacted its last impact fee payment from plaintiffs, plaintiffs' claims against the Town[8] are barred by the three-year statute of limitations set out in N.C.G.S. § 1-52(2).[9]

[2] Finally, we reject the Town's contention that plaintiffs' claims are barred by the doctrine of estoppel by the acceptance of benefits. In our opinion, *Convent of the Sisters of Saint Joseph v. City of Winston-Salem* has no application to the proper resolution of this case. In *Convent*, the plaintiff's predecessor in interest obtained a special use permit in accordance with the applicable zoning ordinance and received authorization to establish an otherwise prohibited elementary school pursuant to certain agreed-upon conditions set out in the applicable permit. 243 N.C. at 325, 90 S.E.2d at 885. Although we held in *Convent* that, "by accepting the benefits of the provisions of the zoning ordinance" the original purchaser "waived any right he might have had to contest the validity

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6. In light of our determination that the three-year statute of limitations set out in N.C.G.S. § 1-52(2) applies in this instance, we need not address the issue of the applicability of the three-year statute of limitations set out in N.C.G.S. § 1-52(5).

7. Although the Town has asserted that a number of shorter limitations periods should be deemed applicable in this instance, we do not find its arguments to that effect persuasive. For example, we are unable to conclude that the one-year statute of limitations set out in N.C.G.S. §§ 160A-364.1 and 1-54(10) has any application to this case because plaintiffs' claims do not rest upon a challenge to the validity of the Town's zoning or unified development ordinances. Similarly, we are unable to conclude that the two-year statute of limitations set out in N.C.G.S. § 1-53(1) has any application to this case because plaintiffs' claims rest upon a charge for water or sewer service imposed in violation of N.C.G.S. § 160A-314(a) rather than upon breach of an implied contract.

8. In determining that plaintiffs' claims against the Town are time-barred by the three-year statute of limitations set out in N.C.G.S. § 1-52(2), we note that the trial court, with the consent of the parties, allowed Quality Built Homes to place $4,000.00 in impact fee payments in escrow. The proper disposition of these monies is addressed at the conclusion of this opinion.

9. As a result of the fact that the three-year statute of limitations set out in N.C.G.S. § 1-52(2) applies to this case, the Court of Appeals necessarily erred in determining that plaintiffs' claims were subject to the ten-year statute of limitations set out in N.C.G.S. § 1-56.

of the ordinance," *id.* at 325, 90 S.E.2d at 885, the fact that the plaintiff's predecessor obtained the right to engage in an otherwise prohibited activity pursuant to the special use permit does not govern the outcome in this case. Here, plaintiffs do not appear to have received any benefit from the payment of the challenged water and sewer impact fees that they would not have otherwise been entitled to receive. As we held in *Virginia-Carolina Peanut Co.*, in an instance in which "[t]he only alternative was to submit to an illegal exaction or discontinue its business," the payment of money "under such pressure[ ] has never been regarded as a voluntary act." 166 N.C. at 74-75, 82 S.E. at 5 (quoting *Robertson v. Frank Brothers Co.*, 132 U.S. 17, 24, 10 S. Ct. 5, 7, 33 L. Ed. 236, 239 (1889)). Thus, we affirm the Court of Appeals' conclusion that plaintiffs' claims against the Town are not barred by the doctrine of estoppel by the acceptance of benefits. As a result, for the reasons set forth above, the Court of Appeals' decision is affirmed, in part, and reversed, in part, and this case is remanded to the Court of Appeals for further remand to the Superior Court, Moore County, for further proceedings not inconsistent with this opinion, including the entry of an order determining the proper disposition of the water and sewer impact fees that Quality Built Homes paid into escrow in accordance with the consent order and addressing any other outstanding issues.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

STATE v. DUNSTON

[371 N.C. 76 (2018)]

STATE OF NORTH CAROLINA
v.
RICHARD DUNSTON

No. 401A17

Filed 11 May 2018

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 806 S.E.2d 697 (2017), finding no error in a judgment entered on 14 April 2016 by Judge Paul C. Ridgeway in Superior Court, Wake County. Heard in the Supreme Court on 18 April 2018.

Joshua H. Stein, Attorney General, by Teresa M. Postell, Assistant Attorney General, for the State.

Jarvis John Edgerton, IV for defendant-appellant.

PER CURIAM.

AFFIRMED.

STATE OF NORTH CAROLINA
v.
HARRY SHAROD JAMES

No. 514PA11-2

Filed 11 May 2018

1. Sentencing—juvenile—first-degree murder

The relevant language in N.C.G.S. §§ 15A-1340.19A to 15A-19D, read contextually and in its entirety, did not create a presumption that juveniles convicted of first-degree murder on a theory other and felony murder should be sentenced to life imprisonment without parole rather than life with parole. The two choices are treated as alternative sentencing options, with the selection to be made on the basis of an analysis of all the relevant facts and circumstances in light of *Miller v. Alabama*, 567 U.S. 460 (2012).

2. Sentencing—first-degree murder—juvenile—no Eighth Amendment violation

There was no merit to a juvenile first-degree murder defendant's argument that the Eighth Amendment was violated by a North Carolina sentencing scheme that did not begin with a presumption in favor of life with parole, and that did not require that a jury find the existence of one or more aggravating circumstances or a finding that the juvenile was irreparably corrupt. The statutory provisions provided sufficient guidance to allow a sentencing judge to make a proper, non-arbitrary sentencing determination.

3. Constitutional Law—sentencing—juvenile—life without parole—not arbitrary or vague

There was no basis for concluding that the absence of a requirement of aggravating circumstances rendered the sentencing process for juveniles convicted of first-degree murder (other than felony murder) arbitrary or vague where defendant was sentenced to life without parole. The statutory provisions required consideration of the factors found in *Miller*, which indicated that life without parole should be exceedingly rare for juveniles.

4. Constitutional Law—ex post facto—juvenile sentencing for murder—revised statute

There was no ex post fact violation in the sentencing of a juvenile for murder where the revised statute under which the juvenile

was sentenced required a choice between life imprisonment, the original sentence, or a lesser punishment.

Justice BEASLEY dissenting.

Justice HUDSON joins in this dissenting opinion.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 786 S.E.2d 73 (2016), reversing an order entered on 12 December 2014 by Judge Robert F. Johnson in Superior Court, Mecklenburg County, and remanding for additional proceedings. On 16 March 2017, the Supreme Court allowed the State's conditional petition for discretionary review concerning an additional issue. Heard in the Supreme Court on 11 December 2017.

Joshua H. Stein, *Attorney General*, *by Sandra Wallace-Smith*, *Special Deputy Attorney General*, *and Robert C. Montgomery*, *Senior Deputy Attorney General*, *for the State-appellant-appellee.*

Glenn Gerding, *Appellate Defender*, *by David W. Andrews*, *Assistant Appellate Defender*, *for defendant-appellant-appellee.*

Juvenile Law Center, *by Marsha L. Levick*, *pro hac vice*, *and Office of the Juvenile Defender*, *by Eric J. Zogry*, *for Juvenile Law Center*, *Campaign for Fair Sentencing of Youth*, *and Juvenile Sentencing Project*, *amici curiae.*

Mark Dorosin, *Elizabeth Haddix*, *Jennifer Watson Marsh*, *Brent Ducharme*, *and Allen Buansi for Senators Angela Bryant and Erica Smith-Ingram*, *Representatives Kelly Alexander*, *Larry Bell*, *Jean Farmer-Butterfield*, *Rosa Gill*, *George Graham*, *Mickey Michaux*, *Amos Quick III*, *Evelyn Terry*, *and Shelly Willingham*, *and Professor Theodore M. Shaw; and Youth Justice Project of the Southern Coalition for Social Justice*, *by K. Ricky Watson*, *Jr. and Peggy Nicholson*, *for Great Expectations*, *amici curiae.*

ERVIN, Justice.

This case involves the validity of the procedures prescribed in N.C.G.S. §§ 15A-1340.19A to 15A-1340.19D for the sentencing of juveniles convicted of first-degree murder in light of *Miller v. Alabama*,

567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012), and its progeny and other constitutional provisions. On 19 June 2006, the Mecklenburg County grand jury returned bills of indictment charging defendant with robbery with a dangerous weapon and first-degree murder on the basis of incidents that occurred on 12 May 2006, when defendant was sixteen years old. On 10 June 2010, a jury returned verdicts convicting defendant of robbery with a dangerous weapon and first-degree murder on the basis of both malice, premeditation and deliberation and the felony murder rule. In light of the jury's verdict, the trial court entered judgments sentencing defendant to a term of sixty-four to eighty-six months imprisonment based upon his conviction for robbery with a dangerous weapon and to a concurrent term of life imprisonment without the possibility of parole, a sentence that was, at that time, mandatory for juvenile defendants convicted of first-degree murder. *See* N.C.G.S. 14-17 (2009) (providing that "any person who commits [murder in the first degree] shall be punished with death or imprisonment in the State's prison for life without parole as the court shall determine pursuant to [N.C.]G.S. [§] 15A-2000, except that any such person who was under 18 years of age at the time of the murder shall be punished with imprisonment in the State's prison for life without parole"). Defendant noted an appeal to the Court of Appeals, which filed an opinion on 18 October 2011 finding no error in the proceedings that led to the entry of the trial court's judgments. *State v. James*, 216 N.C. App. 417, 716 S.E.2d 876, 2011 WL 4917045 (2011) (unpublished).

On 22 November 2011, defendant filed a petition seeking discretionary review of the Court of Appeals' decision by this Court. During the pendency of defendant's discretionary review petition, the United States Supreme Court held in *Miller* that mandatory sentences of life imprisonment without the possibility of parole for juveniles convicted of committing criminal homicides violated the Eighth Amendment's prohibition against cruel and unusual punishments and mandated that sentencing judges consider such offenders' "youth and attendant characteristics" before imposing "the harshest possible penalty" for juveniles. *Miller*, 567 U.S. at 479, 483, 489, 132 S. Ct. at 2469, 2471, 2475, 183 L. Ed. 2d at 424, 426, 430. On 25 June 2012, the day upon which *Miller* was decided, defendant sought leave to amend his discretionary review petition for the purpose of bringing *Miller* to our attention. On 12 July 2012, the Governor signed legislation "to amend the state sentencing laws to comply with the United States Supreme Court decision in *Miller v. Alabama*," (all capital and no italicized letters in the original), providing that defendants convicted of first-degree murder for an offense committed when they were under the age of eighteen "shall be

sentenced in accordance with this Article," with this legislation being applicable to any resentencing hearings held for juveniles "sentenced to life imprisonment without parole prior to the effective date of this act." Act of July 3, 2012, ch. 148, secs. 1, 3, 2011 N.C. Sess. Laws (Reg. Sess. 2012) 713, 713-14. On 23 August 2012, this Court entered an order allowing defendant's discretionary review petition "for the limited purpose of remanding to the Court of Appeals for further remand to the trial court for resentencing pursuant to Article 93 of Chapter 15A of the General Statutes of North Carolina."[1]

The case in which defendant had been convicted of first-degree murder came on for resentencing before the trial court at the 5 December 2014 criminal session of the Superior Court, Mecklenburg County. On 12 December 2014, the trial court entered an order determining, among other things, that:

> The Court [ ] has considered the age of the [d]efendant at the time of the murder, his level of maturity or immaturity, his ability to appreciate the risks and consequences of his conduct, his intellectual capacity, his one prior record of juvenile misconduct (which this Court discounts and does not consider to be pivotal against the [d]efendant, but only helpful as to the light the juvenile investigation sheds upon [d]efendant's unstable home environment), his mental health, any family or peer pressure exerted upon defendant, the likelihood that he would benefit from rehabilitation in confinement, the evidence offered by [d]efendant's witnesses as to brain development in juveniles and adolescents, and all of the probative evidence offered by both parties as well as the record in this case. The Court has considered [d]efendant's statement to the police and his contention that it was his co-defendant Adrian Morene who planned and directed the commission of the crimes against Mr. Jenkins, [and] the Court does note that in some of the details and contentions the statement is self-serving and contradicted by physical evidence in the case. In the exercise of its informed discretion, the Court determines that based upon all the circumstances of the offense and the particular circumstances of the [d]efendant that the

1. Although the new legislation was originally intended to be codified in Article 93 of Chapter 15A of the North Carolina General Statutes, it was actually codified in Article 81B of Chapter 15A at Part 2A, sections 15A-1340.19A, -1340.19B, -1340.19C, and -1340.19D.

> mitigating factors found above, taken either individually or collectively, are insufficient to warrant imposition of a sentence of less than life without parole.

As a result, the trial court ordered that "[d]efendant be imprisoned to Life Imprisonment without Parole." Defendant noted an appeal to the Court of Appeals from the trial court's resentencing judgment.

In seeking relief from the trial court's resentencing judgment before the Court of Appeals, defendant argued that the trial court had, by resentencing him pursuant to N.C.G.S. §§ 15A-1340.19A to 15A-1340.19D (the Act), violated the state and federal constitutional prohibition against the enactment of ex post facto laws, that the relevant statutory provisions subjected him to cruel and unusual punishment and deprived him of his rights to a trial by jury and to not be deprived of liberty without due process of law, and that "the trial court failed to make adequate findings of fact to support its decision to impose a sentence of life without parole." *State v. James*, ___ N.C. App. ___, ___, 786 S.E.2d 73, 77-79, 82 (2016). In a unanimous opinion filed on 3 May 2016, the Court of Appeals upheld the constitutionality of the Act while reversing the trial court's resentencing order and remanding it for further proceedings. For the reasons stated below, we modify and affirm the decision of the Court of Appeals and remand this case for further proceedings not inconsistent with this opinion.

In its opinion, the Court of Appeals began by rejecting defendant's ex post facto argument and his contention that he "should have been resentenced 'consistent with sentencing alternatives available as of the date of the commission of the offense[,]' specifically, 'within the range for the lesser-included offense of second-degree murder.' " *Id.* at ___, 786 S.E.2d at 77-78 (alteration in original). In reaching this result, the Court of Appeals noted that the relevant statutory provision "does not impose a different or greater punishment than was permitted when the crime was committed; nor d[id] it disadvantage defendant in any way." *Id.* at ___, 786 S.E.2d at 78. On the contrary, the new legislation merely afforded the trial court the option of imposing a lesser sentence than had been available at the time that judgment was originally entered against defendant. *Id.* at ___, 786 S.E.2d at 78. In addition, the Court of Appeals noted that "there is no indication that the legislatures in [the] states [in which juvenile defendants had been resentenced based upon convictions for lesser offenses in the aftermath of *Miller*] enacted new sentencing guidelines . . . after the mandatory sentences provided in their respective statutes were determined [to be] unconstitutional." *Id.* at ___, 786 S.E.2d at 78 (first citing *State v. Roberts*, 340 So. 2d 263 (La. 1976); then

citing *Jackson v. Norris*, 2013 Ark. 175, 426 S.W.3d 906 (2013); and then citing *Commonwealth v. Brown*, 466 Mass. 676, 1 N.E.3d 259 (2013)). In this state, however, the General Assembly "acted quickly in response to *Miller* and passed the Act, establishing new sentencing guidelines in N.C.[G.S.] § 15A-1340.19A *et seq.* for juveniles convicted of first-degree murder" and making it "clear that [the statute] was to apply retroactively." *Id.* at ___, 786 S.E.2d at 78. As a result, the Court of Appeals concluded that "there is no violation of the constitutional prohibitions on *ex post facto* laws" in this instance. *Id.* at ___, 786 S.E.2d at 79.

Secondly, the Court of Appeals rejected defendant's contention that the presence of "instead of," the inclusion of mitigating factors, and the absence of aggravating factors in N.C.G.S. § 15A-1340.19C(a) indicated that the General Assembly "presumptively favor[ed] a sentence of life without parole for juveniles convicted of first-degree murder" and created a "risk of disproportionate punishment" indistinguishable from that deemed impermissible in *Miller*. *Id.* at ___, 786 S.E.2d at 79. In reaching this conclusion, the Court of Appeals noted that, "to the extent that starting the sentencing analysis with life without parole creates a presumption, we agree with defendant there is a presumption" in N.C.G.S. § 15A-1340.19C. *Id.* at ___, 786 S.E.2d at 79. Although the use of "instead of" did not, standing alone, create any presumption in favor of a sentence of life imprisonment without the possibility of parole, the use of "instead of" in combination with the statutory requirement that sentencing courts consider mitigating factors and the absence of a requirement that sentencing courts consider aggravating factors in making sentencing decisions did indicate that the General Assembly intended for a sentence of life without the possibility of parole to be deemed presumptively correct. *Id.* at ___, 786 S.E.2d at 79 (stating that "the reason for the General Assembly's use of 'instead of' in N.C.[G.S.] § 15A-1340.19C(a), as opposed to 'or,' becomes clear" under those circumstances). As a result, "[b]ecause the statutes only provide for mitigation from life without parole to life with parole and not the other way around," the Court of Appeals determined that "the General Assembly has designated life without parole as the default sentence, or the starting point for the court's sentencing analysis." *Id.* at ___, 786 S.E.2d at 79.

The Court of Appeals did not, however, accept defendant's contention that the existence of such a presumption in favor of a sentence of life imprisonment without the possibility of parole renders the statutory sentencing scheme unconstitutional. In view of the fact that the relevant statutory provisions were enacted in order to "allow the youth of a defendant and its attendant characteristics to be considered in

determining whether a lesser sentence than life without parole is warranted," the Court of Appeals opined that "it seems commonsense that the sentencing guidelines would begin with life without parole, the sentence provided for adults in N.C.[G.S.] § 14-17 that the new guidelines were designed to deviate from." *Id.* at ___, 786 S.E.2d at 80. Moreover, given that "nothing in N.C.[G.S.] § 15A-1340.19A *et seq.* conflicts with the [United States Supreme] Court's belief that sentences of life without parole for juvenile defendants will be uncommon . . . . [w]ith proper application of the sentencing guidelines in light of *Miller*, it may very well be the uncommon case that a juvenile is sentenced to life without parole under [the statute]." *Id.* at ___, 786 S.E.2d at 80. As a result, the Court of Appeals held that it would not be "unconstitutional [ ] for the sentencing analysis in N.C.[G.S.] § 15A-1340.19A *et seq.* to begin with a sentence of life without parole." *Id.* at ___, 786 S.E.2d at 80.

Thirdly, the Court of Appeals rejected defendant's contention that the failure of the Act to "provide for the consideration of aggravating factors," renders the statute "unconstitutionally vague and will lead to arbitrary sentencing decisions" so as to deprive defendant of liberty without due process of law. *Id.* at ___, 786 S.E.2d at 80-81 (citing N.C.G.S. §§ 15A-1340.16, -2000 (2015)). In light of "the presumption that the statute is constitutional" and the fact that statutory provisions are "strictly construe[d]" so as to "allow[ ] the intent of the legislature to control," the Court of Appeals concluded that the relevant statutory provisions, "viewed . . . through the lens of *Miller*," are "not unconstitutionally vague and will not lead to arbitrary sentencing decisions" given that "[t]he discretion of the sentencing court is guided by *Miller* and the mitigating factors provided in N.C.[G.S.] § 15A-1340.19B(c)." *Id.* at ___, 786 S.E.2d at 81-82 (citations omitted). Similarly, the Court of Appeals rejected defendant's argument that the relevant statutory provisions violate a defendant's right to a trial by jury given the absence of any provision requiring the State to prove, and a jury to find, beyond a reasonable doubt, the existence of any aggravating factors as a prerequisite for the imposition of a sentence of life imprisonment without the possibility of parole in the relevant statutory language. *Id.* at ___, 786 S.E.2d at 82.

Finally, the Court of Appeals agreed with defendant's assertion that the trial court had "failed to make adequate findings of fact to support its decision to impose a sentence of life without parole." *Id.* at ___, 786 S.E.2d at 82. According to the Court of Appeals, the trial court's order "simply lists the trial court's considerations and final determination" without identifying "which considerations are mitigating and which are not." *Id.* at ___, 786 S.E.2d at 84. In other words, the trial court made

"inadequate findings as to the presence or absence of mitigating factors to support its determination," thereby "abus[ing] its discretion in sentencing defendant to life without parole." *Id.* at ___, 786 S.E.2d at 84. As a result, the Court of Appeals reversed the trial court's judgment and remanded this case to the Superior Court, Mecklenburg County for further sentencing proceedings.

In seeking further review of the Court of Appeals' decision by this Court, defendant argued that, "[b]y upholding a presumption in favor of life without parole, the Court of Appeals issued a decision that violates *Miller* and would lead to life without parole sentences for juveniles who are not among the worst offenders," contrary to the United States Supreme Court's determination that a sentence of life imprisonment without the possibility of parole would be "excessive for all but 'the rare juvenile offender whose crime reflects irreparable corruption,' " quoting *Montgomery v. Louisiana*, ___ U.S. ___ , ___ , 136 S. Ct. 718, 734, 193 L. Ed. 2d 599, 619 (2016) (quoting *Miller*, 567 U.S. at 480-81, 132 S. Ct. at 2469, 183 L. Ed. 2d at 424)). In addition, defendant asserted that "the Court of Appeals erroneously concluded that the sentencing procedures outlined in [the Act] provide sufficient guidance to trial courts," "erroneously upheld a sentencing scheme that could only lead to arbitrary sentencing decisions," and erroneously rejected defendant's ex post facto claim. The State, on the other hand, urged us to refrain from granting further review in this case given that the Court of Appeals had "correctly determined N.C.[G.S.] § 15A-1340.19A *et seq.* did not create an unconstitutional presumption in favor of life without parole," was not unconstitutionally vague or arbitrary, and did not constitute an impermissible ex post facto law. In the event that we decided to grant defendant's discretionary review petition, the State sought further review of the Court of Appeals' determination that the relevant statutory provisions created a presumption in favor of a sentence of life imprisonment without the possibility of parole. We granted defendant's discretionary review petition and the State's conditional discretionary review petition on 16 March 2017.

[1] In his challenge to the validity of its decision, defendant contends that the Court of Appeals erred by holding that a statute establishing a presumption in favor of the imposition of a sentence of life imprisonment without the possibility of parole upon a juvenile convicted of first-degree murder does not subject the juvenile to impermissibly cruel and unusual punishment. In view of the fact that we are unable to appropriately consider this contention without first addressing the State's challenge to the validity of the Court of Appeals' determination

that the relevant statutory provisions embody such a presumption, we will begin our analysis by addressing the State's contention that N.C.G.S. § 15A-1340.19C does not "give[ ] rise to a mandatory presumption" that a juvenile convicted of first-degree murder on the basis of a theory other than the felony murder rule should be sentenced to life imprisonment without the possibility of parole.

In seeking to persuade us that the Court of Appeals had misconstrued N.C.G.S. §§ 15A-1340.19A to 15A-1340.19D, the State contends that, rather than being "interpreted in isolation," the words in which a statute is couched should be read in "context and with a view to their place in the overall statutory scheme," quoting *Sturgeon v. Frost*, ___ U.S. ___, ___, 136 S. Ct. 1061, 1070, 194 L. Ed. 2d 108, 121 (2016). According to the State, the legislative intent underlying the relevant statutory language "must be found from the language of the act, its legislative history and the circumstances surrounding its adoption which throw light upon the evil sought to be remedied," quoting *State v. Oliver*, 343 N.C. 202, 212, 470 S.E.2d 16, 22 (1996) (emphasis added). In view of the fact that the General Assembly enacted N.C.G.S. §§ 15A-1340.19A to 15A-1340.19D "to amend the state sentencing laws to comply with the United State Supreme Court decision in *Miller v. Alabama*," Ch. 148, 2011 N.C. Sess. Laws (Reg. Sess. 2012) at 713 (effective 12 July 2012), the State contends that "any interpretation of the statute must hold that point paramount." As a result of the fact that "*Miller* certainly didn't create a presumption in favor of [life imprisonment without the possibility of parole] but rather one of [life imprisonment with parole] that can only be changed with the requisite hearing," "to juxtapose a sentencing presumption of [life imprisonment without the possibility of parole] on every juvenile convicted of murder . . . would be injurious to *Miller*'s intent, and counter to the General Assembly's articulated intent to enforce *Miller*."[2] For that reason, the State contends that "[i]t is inconceivable that the General Assembly would enact legislation intended to comport with the mandates of *Miller*, which by its very terms offends them." Since "courts presume that the General Assembly would not contradict itself in the same statute," citing *Brown v. Brown*, 353 N.C. 220, 226, 539 S.E.2d 621, 625 (2000), the State asserts that N.C.G.S. § 1340.19(B)(a)(2) "plainly cast[s]

2. In its appellee's brief before this Court, the State argues that "[t]he court's sentencing decision [pursuant to N.C.G.S. § 15A-1340.19C(a)] is binary, life with parole or life without parole"; however, "if the courts were to assume such a presumption *Miller*, as is reinforced by *Montgomery*, would necessitate that such a presumption would favor life without parole," on the grounds that the juvenile "must show that he fits in that protected status" of "juvenile offenders whose crimes reflect the transient immaturity of youth." (Quoting *Montgomery* at ___ U.S. at ___, 136 S. Ct. at 724, 193 L. Ed. 2d at 609).

the sentencing choice between [life imprisonment without the possibility of parole] and [life imprisonment with parole] in the disjunctive."

In arguing that the Court of Appeals "correctly understood how [the Act] operated," defendant asserts that "[t]he two sentencing options available under the sentencing scheme are not equal alternatives" because, "[b]y using the phrase 'instead of,' " rather than requiring a trial court to choose "between" the sentencing options, "the General Assembly created a procedure in which the sentencing court's decision to impose life with parole is dependent upon the court first rejecting life without parole." In view of the fact that the relevant statutory language only refers to "mitigating factors," which "are used by defendants to show that the case 'warrant[s] a less severe sentence,' " quoting *State v. Norris*, 360 N.C. 507, 512, 630 S.E.2d 915, 918, *cert. denied*, 549 U.S. 1064, 127 S. Ct. 689, 166 L. Ed. 2d 535 (2006), and fails to compel a court "to justify a sentence of life without parole by finding any aggravating factors," defendant contends that "the General Assembly created a scheme in which the sole decision is whether to push the sentence down from the default sentence of life without parole to the lesser sentence of life with parole."

In addition, defendant argues that legislative intent "cannot salvage an otherwise unconstitutional statute," with it being "the duty of the courts to give effect to the words actually used in a statute" without "delet[ing] words used or [ ] insert[ing] words not used." *State v. Watterson*, 198 N.C. App. 500, 505, 679 S.E.2d 897, 900 (2009). "The intent of the legislature . . . is to be found not in what the legislature meant to say, but in the meaning of what it did say." *Burnham v. Adm'r, Unemployment Comp. Act*, 184 Conn. 317, 325, 439 A.2d 1008, 1012 (1981). Thus, defendant contends, even though "the General Assembly intended to comply with *Miller*, it nevertheless created a sentencing scheme with a presumption in favor of life without parole" in violation of *Miller*'s requirement that "courts only impose sentences of life without parole for the 'rare' juvenile who exhibits 'irreparable corruption.' " Even if this Court were to examine the legislative intent, that intent "was undoubtedly influenced by its understanding of *Miller* when the opinion in *Miller* was first issued." Defendant contends that, in view of the fact that *Miller* was construed as largely procedural until *Montgomery* was decided, "our General Assembly enacted the new sentencing scheme before the full scope of *Miller* was widely understood and without the deliberation necessary to properly implement a transformative constitutional rule."

"Legislative intent controls the meaning of a statute." *Midrex Techs., Inc. v. N.C. Dep't of Revenue*, 369 N.C. 250, 258, 794 S.E.2d 785, 792 (2016) (quoting *Brown v. Flowe*, 349 N.C. 520, 522, 507 S.E.2d 894, 895 (1998)).

> The intent of the General Assembly may be found first from the plain language of the statute, then from the legislative history, "the spirit of the act and what the act seeks to accomplish." If the language of a statute is clear, the court must implement the statute according to the plain meaning of its terms so long as it is reasonable to do so.

Id. at 258, 794 S.E.2d at 792 (quoting *Lenox, Inc. v. Tolson*, 353 N.C. 659, 664, 548 S.E.2d 513, 517 (2001) (internal citation omitted). "Although the title given to a particular statutory provision is not controlling, it does shed some light on the legislative intent underlying the enactment of that provision." *State v. Fletcher*, ___ N.C. ___, ___, 807 S.E.2d 528, 539 (2017) (citing *Brown v. Brown*, 353 N.C. at 224, 539 S.E.2d at 623). "[E]ven when the language of a statute is plain, 'the title of an act should be considered in ascertaining the intent of the legislature.' " *Ray v. N.C. Dep't of Transp.*, 366 N.C. 1, 8, 727 S.E.2d 675, 681 (2012) (quoting *Smith Chapel Baptist Church v. City of Durham*, 350 N.C. 805, 812, 517 S.E.2d 874, 879 (1999) (citing *State ex rel. Cobey v. Simpson*, 333 N.C. 81, 90, 423 S.E.2d 759, 764 (1992))). Finally, "a statute enacted by the General Assembly is presumed to be constitutional," *Wayne Cty. Citizens Ass'n v. Wayne Cty. Bd. of Commr's*, 328 N.C. 24, 29, 399 S.E.2d 311, 314-15 (1991) (citation omitted), and "will not be declared unconstitutional unless this conclusion is so clear that no reasonable doubt can arise, or the statute cannot be upheld on any reasonable ground," *id.* at 29, 399 S.E.2d at 315 (citing, *inter alia*, *Poor Richard's, Inc. v. Stone*, 322 N.C. 61, 63, 366 S.E.2d 697, 698 (1988)). "Where a statute is susceptible of two interpretations, one of which is constitutional and the other not, the courts will adopt the former and reject the latter." *Id.* at 29, 399 S.E.2d at 315 (citing *Rhodes v. City of Asheville*, 230 N.C. 759, 53 S.E.2d 313 (1949)).

The first section of Part 2A of Article 81B of Chapter 15A of the North Carolina General Statutes is N.C.G.S. § 15A-1340.19A, which is entitled "Applicability" and provides that "a defendant who is convicted of first degree murder, and who was under the age of 18 at the time of the offense, shall be sentenced in accordance with this Part." N.C.G.S. § 15A-1340.19A (2017). N.C.G.S. § 15A-1340.19B, which is entitled

"Penalty determination," requires that juveniles convicted of first-degree murder be sentenced to life imprisonment with parole "[i]f the sole basis for conviction . . . was the felony murder rule." *Id.* § 15A-1340.19B(a)(1) (2017). In all other cases, "the court shall conduct a hearing to determine whether the defendant should be sentenced to life imprisonment without parole, as set forth in [N.C.]G.S. [§] 14-17, or a lesser sentence of life imprisonment with parole." *Id.* § 15A-1340.19B(a)(2) (2017). At the "penalty determination" hearing, "[t]he defendant or the defendant's counsel may submit mitigating circumstances to the court, including, but not limited to, the following factors:

(1) Age at the time of the offense.

(2) Immaturity.

(3) Ability to appreciate the risks and consequences of the conduct.

(4) Intellectual capacity.

(5) Prior record.

(6) Mental health.

(7) Familial or peer pressure exerted upon the defendant.

(8) Likelihood that the defendant would benefit from rehabilitation in confinement.

(9) Any other mitigating factor or circumstance.

Id. § 15A-1340.19B(c) (2017). In addition, N.C.G.S. § 15A-1340.19B provides that "[t]he State and the defendant or the defendant's counsel shall be permitted to present argument for or against the sentence of life imprisonment with parole," with the defendant or the defendant's counsel having "the right to the last argument." Finally, N.C.G.S. § 15A-1340.19C, entitled "Sentencing; assignment for resentencing," provides that:

> The court shall consider any mitigating factors in determining whether, based upon all the circumstances of the offense and the particular circumstances of the defendant, the defendant should be sentenced to life imprisonment with parole instead of life imprisonment without parole. The order adjudging the sentence shall include findings on the absence or presence of any mitigating

> factors and such other findings as the court deems appropriate to include in the order.

Id. § 15A-1340.19C(a)(2017).[3]

After carefully examining the relevant statutory language, we are unable to conclude that the language in question, when read contextually and in its entirety, unambiguously creates a presumption that juveniles convicted of first-degree murder on the basis of a theory other than the felony murder rule should be sentenced to life imprisonment without the possibility of parole rather than life imprisonment with parole. On the contrary, when read in context, we are inclined to believe that the relevant statutory language treats life imprisonment without the possibility of parole and life imprisonment with parole as alternative sentencing options, with the selection between these two options to be made on the basis of an analysis of all of the relevant facts and circumstances in light of the substantive standard enunciated in *Miller*. *See* 567 U.S. at 479-80, 132 S. Ct. at 2469, 183 L. Ed. 2d at 424 (stating that the sentence of life imprisonment without the possibility of parole should be reserved for "the rare juvenile offender whose crime reflects irreparable corruption" and should not be imposed upon "the juvenile offender whose crime reflects unfortunate yet transient immaturity" (quoting *Roper v. Simmons*, 543 U.S. 551, 573, 125 S. Ct. 1183, 1197, 161 L. Ed. 2d 1, 24 (2005))). In reaching this conclusion, we note that N.C.G.S. § 15A-1340.19B(a)(2), which describes the issue before the sentencing court as "whether the defendant should be sentenced to life imprisonment without parole . . . or a lesser sentence of life imprisonment with parole," does not expressly state or even appear to assume that, all else being equal, any particular sentence is presumptively deemed to be appropriate in any particular case. Similarly, the fact that N.C.G.S. § 15A-1340.19B(b) allows the parties to present evidence concerning "any matter that the court deems relevant to sentencing," including evidence relating to the mitigating factors listed in N.C.G.S. § 15A-1340.19B(c), suggests that a number of factors, including, but not limited to, the statutorily enumerated mitigating factors, must be considered in making the required sentencing determination and that the sentencing court is required to consider the totality of the circumstances in

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3. The remainder of N.C.G.S. § 15A-1340.19C, which governs motions for appropriate relief seeking resentencing, and N.C.G.S. § 15A-1340.19D, which enunciates the circumstances under which a juvenile sentenced to life imprisonment with the possibility of parole for first-degree murder is eligible for parole pursuant to N.C.G.S. § 15A-1340.19B(a)(1), have no relevance to the issues before the Court in this case.

determining whether the defendant should be sentenced to life imprisonment with or without the possibility of parole without relying upon a presumption that either sentence is appropriate in any particular instance. Finally, the fact that N.C.G.S. § 15A-1340.19C requires the sentencing court to determine, after considering "all the circumstances of the offense," "the particular circumstances of the defendant," and "any mitigating factors," whether "the defendant should be sentenced to life imprisonment with parole instead of life imprisonment without parole" reinforces our conclusion that the relevant statutory provisions create two sentencing options, neither of which is deemed to be presumptively appropriate, between which the trial court must choose based upon a consideration of the totality of the circumstances in light of the relevant substantive standard set out in *Miller*. As a result, the relevant statutory language, when read in context, treats the sentencing decision required by N.C.G.S. § 15A-1340.19C(a) as a choice between two equally appropriate sentencing alternatives and, at an absolute minimum, does not clearly and unambiguously create a presumption in favor of sentencing juvenile defendants convicted of first-degree murder on the basis of a theory other than the felony murder rule to life imprisonment without the possibility of parole.

In urging us to determine that the relevant statutory provisions clearly and unambiguously embody a presumption in favor of a sentence of life imprisonment without the possibility of parole, defendant points to a number of expressions that the General Assembly utilized in describing the required sentencing decision. For example, defendant notes that the relevant statutory provisions require the sentencing court to determine whether a juvenile defendant convicted of first-degree murder on the basis of a theory other than the felony murder rule should be "sentenced to life imprisonment with parole *instead of* life imprisonment without parole" (emphasis added) and argues that the statutory expression "instead of" can only be understood to mean that a sentence of life imprisonment with parole is nothing more than an alternative to the presumptively correct sentence of life imprisonment without the possibility of parole. Although the word "instead" can be construed in a number of ways, it is typically understood "as an alternative or substitute." *New Oxford American Dictionary* 900 (3d ed. 2010). In accordance with ordinary English usage, the fact that something is an "alternative or substitute" for something else means nothing more than that both alternatives are available without necessarily suggesting that one is preferred over the other. As a result, we believe that the statutory language requiring the sentencing judge to determine whether the defendant should be sentenced to life imprisonment with parole "instead of"

life imprisonment without the possibility of parole is fully consistent with a construction that treats the language in question as requiring the sentencing judge to choose between two appropriate alternatives to be chosen on the basis of a proper application of the relevant legal standard rather than requiring the sentencing judge to select between a default sentence of life imprisonment without the possibility of parole and a secondary option of life imprisonment with parole.[4]

In addition, defendant directs our attention to the fact that the General Assembly referred to "mitigating factors" in N.C.G.S. § 15A-1340.19C(a) and included a list of potentially available "mitigating circumstances" in N.C.G.S. § 15A-1340.19B(c). Although a mitigating factor or circumstance is commonly understood as a consideration that "make[s something] less severe, serious, or painful" or "lessen[s] the gravity of" something "so as to make [that thing], esp. a crime, appear less serious and thus [to] be punished more leniently," *New Oxford American Dictionary* 1121 (3d ed. 2010), the presence of these references to "mitigating factors" and "mitigating circumstances" in the relevant statutory language does not compel the conclusion that persuading the sentencing court to adopt and credit such mitigating evidence is necessary in order to preclude the imposition of a more severe, and presumptively correct, sentence. On the contrary, the consideration of "mitigating factors" or "mitigating circumstances" is clearly relevant to the determination of whether the less severe of the two available options should be imposed upon a particular defendant in light of the totality of the relevant circumstances and the applicable legal standard, with the State having introduced evidence of the circumstances surrounding the commission of the crime during the guilt-innocence phase of the trial and with the defendant having introduced evidence of mitigating circumstances in addition to those arising from the commission of the crime at the sentencing hearing. For that reason, a requirement that the sentencing judge consider evidence tending to show the existence of "mitigating factors" or "circumstances" is in no way inconsistent with a requirement that the sentencing authority make a choice between two equally appropriate alternatives based upon an analysis of the relevant evidence and the applicable law. Thus, the primary arguments that

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4. The same logic precludes us from concluding that the language contained in N.C.G.S. § 15A-1340.19B(d) allowing both "[t]he State and the defendant or the defendant's counsel" "to present argument for or against the sentence of life imprisonment with parole" was intended to create a presumption in favor of a sentence of life imprisonment without parole which should be given effect unless the defendant establishes that a sentence of life imprisonment with parole should be imposed.

defendant has advanced in support of his assertion that the relevant statutory provisions create a presumption to the effect that, all other things being equal, a sentencing judge should sentence a juvenile convicted of first-degree murder on the basis of a theory other than the felony murder rule to life imprisonment without the possibility of parole simply do not demonstrate that the relevant statutory language necessarily reflects reliance upon such a presumption and appear to view certain statutory provisions in isolation rather than analyzing the relevant statutory language in its entirety. *See N. Carolina Dep't of Transp. v. Mission Battleground Park, DST*, ___ N.C. ___, ___, 810 S.E.2d 217, 222 (2018) (reversing the Court of Appeals because that court's approval of the trial court's decision to exclude certain expert testimony was based upon a construction of N.C.G.S. § 93A-83(f) that failed to interpret the language of that subsection "holistically with the rest of the statute," and noting that "[p]erhaps no interpretive fault is more common than the failure to follow the whole-text canon, which calls on the judicial interpreter to consider the entire text, in view of its structure and of the physical and logical relation of its many parts," (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 167 (2012))).

As we have already noted, the legislation in which the relevant statutory provisions appear is captioned "[a]n act to amend the state sentencing laws to comply with the . . . decision in *Miller v. Alabama*," Ch. 148, 2011 N.C. Sess. Laws (Reg. Sess. 2012) at 713, in which the United States Supreme Court stated that the imposition of sentences of life imprisonment without the possibility of parole upon such juvenile offenders would be "uncommon" and should be reserved for "the rare juvenile offender whose crime reflects irreparable corruption" rather than being imposed upon "the juvenile offender whose crime reflects unfortunate yet transient immaturity." *Miller*, 567 U.S. at 479-80, 132 S. Ct. at 2469, 183 L. Ed. 2d at 424 (quoting *Roper*, 543 U.S. at 573, 125 S. Ct. at 1197, 161 L. Ed. 2d 1, 24 (2005)); *see Montgomery v. Louisiana*, ___ U.S. at ___, 136 S. Ct. at 734, 193 L. Ed. 2d at 619-20 (reiterating that "*Miller* determined that sentencing a child to life without parole is excessive for all but 'the rare juvenile offender whose crime reflects irreparable corruption' " and "rendered life without parole an unconstitutional penalty" for "juvenile offenders whose crimes reflect the transient immaturity of youth" (first quoting *Miller*, 567 U.S. at 479-80, 132 S. Ct. at 2469, 183 L. Ed. 2d at 424; then citing *Penry v. Lynaugh*, 492 U.S. 302, 330, 109 S. Ct. 2934, 2953, 106 L. Ed. 2d 256, 285 (1989))). In view of the fact "that a lifetime in prison is a disproportionate sentence for all but the rarest of children, those whose crimes reflect 'irreparable corruption,' " a statutory sentencing scheme embodying a presumption in favor of a sentence

of life imprisonment without the possibility of parole for a juvenile convicted of first-degree murder on the basis of a theory other than the felony murder rule would be, at an absolute minimum, in considerable tension with the General Assembly's expressed intent to adopt a set of statutory provisions that complied with *Miller* and with the expressed intent of the United States Supreme Court that, as a constitutional matter, the imposition of a sentence of life imprisonment without the possibility of parole upon a juvenile be a rare event. *Montgomery*, ___ U.S. at ___, 136 S. Ct. at 726, 193 L. Ed. 2d at 611 (quoting *Miller*, 576 U.S. at 479-80, 132 S. Ct. at 2469, 183 L. Ed. 2d at 424); *see also People v. Gutierrez*, 58 Cal. 4th 1354, 1382, 1387, 324 P.3d 245, 264, 267 (2014) (holding that construing a sentencing statute as establishing "a presumption in favor of life without parole [for juvenile homicide offenders] raises serious constitutional concerns under the reasoning of *Miller* and the body of precedent upon which *Miller* relied"). Thus, the relevant canons of statutory construction to the effect that statutory language should, where reasonably possible, be construed so as to reflect the legislative intent stated in the statutory caption and to avoid constitutional difficulties clearly militate against the adoption of a construction of the relevant statutory language like that adopted by the Court of Appeals and contended for by defendant.

As a result, given that the statutory language contained in N.C.G.S. §§ 15A-1340.19A to 15A- 1340.19D is devoid of any express provision creating a presumption in favor of sentencing juveniles convicted of first-degree murder on the basis of a theory other than the felony murder rule to life imprisonment without the possibility of parole, given that the relevant statutory language is fully consistent with the view that the available sentencing options should be treated as alternatives to be adopted based upon an analysis of the relevant evidence in light of the applicable legal standard rather than as preferred and secondary alternatives, and given that construing the statutory language at issue in this case to incorporate a presumption in favor of the imposition of a sentence of life without the possibility of parole would conflict with the General Assembly's stated intent to comply with *Miller* and raise serious doubts about the constitutionality of the challenged statutory provisions, we hold that the Court of Appeals erred by construing the relevant statutory language to incorporate such a presumption.[5] On the contrary,

5. In view of our determination that the relevant statutory provisions do not, contrary to the Court of Appeals' decision, incorporate a presumption in favor of the imposition of a sentence of life imprisonment without the possibility of parole, we need not definitely resolve the issue of whether the Court of Appeals erred by deeming such a presumption to be constitutionally permissible in the juvenile sentencing context.

trial judges sentencing juveniles convicted of first-degree murder on the basis of a theory other than the felony murder rule should refrain from presuming the appropriateness of a sentence of life imprisonment without the possibility of parole and select between the available sentencing alternatives based solely upon a consideration of "the circumstances of the offense," "the particular circumstances of the defendant," and "any mitigating factors," N.C.G.S. § 15A-1340.19C(a), as they currently do in selecting a specific sentence from the presumptive range in a structured sentencing proceeding, in light of the United States Supreme Court's statements in *Miller* and its progeny to the effect that sentences of life imprisonment without the possibility of parole should be reserved for those juvenile defendants whose crimes reflect irreparable corruption rather than transient immaturity.

[2] In his second challenge to the Court of Appeals' decision, defendant contends that, even if the relevant statutory provisions do not incorporate a presumption in favor of a sentence of life imprisonment without the possibility of parole, the Act violates the Eighth Amendment given that a "sentencing scheme [for juveniles convicted of first-degree murder] must begin with a presumption in favor of life with parole" in light of the United States Supreme Court's recognition of the differences between adult and juvenile offenders and the rarity with which the United States Supreme Court believes that sentences of life imprisonment without parole should be imposed upon juveniles convicted of first-degree murder. In addition, defendant contends that a sentencing scheme that is devoid of any requirement that a jury find the existence of one or more aggravating circumstances or that a sentencing judge find the juvenile to be "irreparably corrupt" or "permanently incorrigible" before the juvenile can be sentenced to life imprisonment without the possibility of parole and, instead, merely requires a sentencing judge to "consider" mitigating factors and make findings based on the "absence or presence" of such factors "hinders the trial court's ability to winnow the class of juvenile defendants to those who might qualify for a sentence of life without parole" so as to be "unconstitutionally vague" and create an impermissible risk of the imposition of arbitrary sentences of life without the possibility of parole upon a juvenile defendant convicted of first-degree murder. The State, on the other hand, argues that, because *Miller* provided "boundaries sufficiently distinct for judges to interpret and administer [the statutes] uniformly" and because the relevant statutory provisions require use of "the precise method and procedure that is set out" in *Miller*, the Court of Appeals correctly held that the Act "is not unconstitutionally vague and will not lead to arbitrary sentencing decisions."

A statute is unconstitutionally vague in the event that it "(1) fails to 'give the person of ordinary intelligence a reasonable opportunity to know what is prohibited;' or (2) fails to 'provide explicit standards for those who apply [the law].' " *State v. Green*, 348 N.C. 588, 597, 502 S.E.2d 819, 824 (1998) (alteration in original) (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108, 92 S. Ct. 2294, 2298-99, 33 L. Ed. 2d 222, 227 (1972)), *cert. denied*, 525 U.S. 1111, 119 S. Ct. 883, 142 L. Ed. 2d 783 (1999). In upholding the validity of the legislation at issue in *Green*, this Court construed the relevant statutory language *in pari materia* with other parts of the Juvenile Code, including the statutory specification of the factors that must be weighed in making juvenile dispositional decisions; considered "the evolving standards and will of the majority in society," which suggested support for more stringent treatment of juvenile offenders; and determined that the relevant statutory language, when considered "in light of the entire Juvenile Code, provides sufficient guidance to juvenile court judges in making transfer decisions and does not on its face violate due process principles." *Id.* at 599-600, 502 S.E.2d at 826. Similarly, a trial judge required to sentence a juvenile convicted of first-degree murder on the basis of a theory other than the felony murder rule must consider "all the circumstances of the offense," "the particular circumstances of the defendant," and the mitigating circumstances enumerated in subsection 15A-1340.19B(c), N.C.G.S. § 15A-1340.19C, and comply with *Miller*'s directive that sentences of life imprisonment without the possibility of parole for juveniles convicted of first-degree murder should be the exception, rather than the rule, with the "harshest prison sentence" to be reserved for "the rare juvenile offender whose crime reflects irreparable corruption," rather than "unfortunate yet transient immaturity." *Miller*, 567 U.S. at 479-80, 132 S. Ct. at 2469, 183 L. Ed. 2d at 424. In our view, the statutory provisions at issue in this case, when considered in their entirety and construed in light of the constitutional requirements set out in *Miller* and its progeny as set out in more detail above, provide sufficient guidance to allow a sentencing judge to make a proper, non-arbitrary determination of the sentence that should be imposed upon a juvenile convicted of first-degree murder on a basis other than the felony murder rule to satisfy due process requirements.

[3] Similarly, we conclude that defendant's arbitrariness argument, which rests upon the assertion that the sentencing authority must either find the existence of aggravating circumstances or make other "narrowing" findings before sentencing a juvenile convicted of first degree murder to life imprisonment without the possibility of parole, lacks merit. Although the United States Supreme Court did hold in *Zant v. Stephens*, 462 U.S. 862, 103 S. Ct. 2733, 77 L. Ed. 2d 235 (1983), that a

capital sentencing statute that utilized statutory aggravating factors for the sole purpose of "categorical narrowing at the definition stage" so as to "circumscribe the class of persons eligible for the death penalty" was constitutional, *id.* at 878-79, 103 S. Ct. at 2743-44, 77 L. Ed. 2d at 250-51, nothing in either *Zant* or *Miller* suggests that such a formalized narrowing process is constitutionally required prior to the imposition of a valid sentence of life imprisonment without the possibility of parole upon a juvenile convicted of first-degree murder on the basis of a theory other than the felony murder rule.[6] Aside from the fact that "the penalty of death is qualitatively different from a sentence of imprisonment, however long," *Woodson v. North Carolina*, 428 U.S. 280, 305, 96 S. Ct. 2978, 2991, 49 L. Ed. 2d 944, 961 (1976), *Miller* and its progeny focus upon the necessity for requiring sentencing authorities "to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison," *Miller*, 567 U.S. at 479-80, 132 S. Ct. at 2469, 183 L. Ed. 2d at 424, with these differences including "chronological age and its hallmark features," such as "immaturity, impetuosity, and failure to appreciate risks and consequences"; "the family and home environment that surrounds" the juvenile; "the circumstances of the homicide offense" committed by the juvenile, "including the extent of his participation in the conduct and the way familial and peer pressures may have affected him"; and any "incompetencies associated with youth – for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys," while preventing a court from "disregard[ing] the possibility of rehabilitation even when the circumstances most suggest it," *id.* at 477-78, 132 S. Ct. at 2468, 183 L. Ed. 2d at 422-23. According to *Miller*, a sentencing authority is required to "follow a certain process – considering an offender's youth and attendant characteristics" and other "mitigating circumstances before imposing the harshest penalty for juveniles," *id.* at 483, 489, 132 S. Ct. at 2471, 2475, 183 L. Ed. 2d at 426, 430, in light of the applicable legal standard. As a result of the fact that the statutory provisions at issue in this case require consideration of the factors enunciated in *Miller* and its progeny and the fact that *Miller* and its progeny indicate that life without parole sentences

6. Although we hold that a formal narrowing process is not required by *Miller* and its progeny, N.C.G.S. § 15A-1340.19B and N.C.G.S. § 15A-1340.19C do, as construed above, serve a narrowing function by precluding the imposition of a sentence of life imprisonment without the possibility of parole upon a juvenile convicted of first-degree murder on the basis of the felony murder rule and limiting the extent to which juveniles convicted of first-degree murder on the basis of other legal theories can be sentenced to life imprisonment without the possibility of parole.

for juveniles should be exceedingly rare and reserved for specifically described individuals, we see no basis for concluding that the absence of any requirement that the sentencing authority find the existence of aggravating circumstances or make any other narrowing findings prior to determining whether to impose a sentence of life without parole upon a juvenile convicted of first-degree murder on a basis other than the felony murder rule renders the sentencing process enunciated in N.C.G.S. §§ 15A-1340.19A to 15A-1340.19D unconstitutionally arbitrary or vague. [7]

[4] Finally, defendant urges this Court to reverse the Court of Appeals' decision to reject his challenge to the relevant statutory provisions on ex post facto law grounds on the theory that the sentences of life imprisonment without the possibility of parole and life imprisonment with parole permitted by the Act "were more severe than the sentence [that defendant] could have received if he had been sentenced based on the lawful provisions in effect" when the murder for which he was convicted occurred. In defendant's view, the fact that the pre-*Miller* statutory provisions authorizing the imposition of a mandatory sentence of life imprisonment without the possibility of parole upon juveniles convicted of first-degree murder lacked a "savings clause" authorizing the imposition of an alternative punishment in the event that the applicable mandatory life without parole sentence was declared to be unconstitutional means that "there was no constitutional sentence for first-degree murder committed by a juvenile on the offense date for this case." As a result, defendant asserts that he "could not be sentenced for" first-degree murder and must be sentenced as if he had been convicted of second-degree murder, which was "the most severe constitutional penalty established by the legislature for criminal homicide at the time the offense was committed," first quoting *State v. Roberts*, 340 So. 2d 263, 263 (La. 1976), and then citing, *inter alia*, *State v. Kirkman*, 293 N.C. 447, 460-61, 238 S.E.2d 456, 464 (1977) (noting that a life imprisonment sentence did not violate the ex post facto clause when the statute mandating the death penalty

7. Although defendant has not questioned the correctness of the Court of Appeals' rejection of his challenge to the relevant statutory provisions as violative of his Sixth Amendment right to a jury trial, he did argue before this Court that the failure of N.C.G.S. § 15A-1340.19B and N.C.G.S. § 15A-1340.19C to require a narrowing finding violates the principles enunciated in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), and *Blakely v. Washington*, 542 U.S 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), by failing to require that a jury find the aggravating circumstances that he believes to be necessary in order to avoid a finding of arbitrariness. However, we need not address this argument given our conclusion that a valid statutory scheme for the sentencing of juveniles convicted of first-degree murder does not require the sentencing authority to find the existence of aggravating circumstances before imposing a sentence of life imprisonment without the possibility of parole.

for first-degree murder also set out life imprisonment as the applicable punishment should death sentences be determined unconstitutional); *also citing United States v. Under Seal*, 819 F.3d 715, 726 (4th Cir. 2016); and *Commonwealth v. Brown*, 466 Mass. 676, 1 N.E.3d 259 (2013). The State, on the other hand, contends that the Act imposes the "same legal consequence of life imprisonment without parole as the sentencing statute at the time of the murder" and does not, for that reason, impermissibly disadvantage defendant and asserts that defendant's ex post facto law claim is foreclosed by the United States Supreme Court's rejection of a similar argument in *Dobbert v. Florida*, 432 U.S. 282, 97 S. Ct. 2290, 53 L. Ed. 2d 344 (1977).

The federal and state constitutions prohibit the enactment and enforcement of ex post facto laws, which "allow[ ] imposition of a different or greater punishment than was permitted when the crime was committed." *State v. Barnes*, 345 N.C. 184, 233-34, 481 S.E.2d 44, 71 (1997) (quoting *State v. Vance*, 328 N.C. 613, 620-21, 403 S.E.2d 495, 500 (1991)), *cert. denied*, 523 U.S. 1024, 118 S. Ct. 1024, 140 L. Ed. 2d 473 (1998). "There are two critical elements to an *ex post facto* law: that it is applied to events occurring before its creation and that it disadvantages the accused that it affects." *Id.* at 234, 481 S.E.2d at 71 (citing *Vance*, 328 N.C. at 620-21, 403 S.E.2d at 500). As the Court of Appeals noted, "[t]here is no dispute concerning the [existence of the] first element in this case," since the law pursuant to which defendant was resentenced was enacted years after the commission of the crime for which he was being sentenced. *James*, ___ N.C. App. at ___, 786 S.E.2d at 77. The Court of Appeals was also correct in holding that the relevant statutory provisions did not "allow[ ] imposition of a different or greater punishment than was permitted when the crime was committed," *Vance*, 328 N.C. at 620, 403 S.E.2d at 500 (citing *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390, 1 L. Ed. 648, 650 (1798) (opinion of Chase, J.)), so as to impermissibly disadvantage defendant. Instead, N.C.G.S. §§ 15A-1340.19A to 15A-1340.19D allows the trial court to choose between the same punishment required by prior law and a less severe punishment.

The Court of Appeals correctly rejected defendant's contention that he should have been resentenced as if he had been convicted of second-degree murder on the basis of *Dobbert*, which held that a new sentencing statute that was enacted to address constitutional defects in an earlier sentencing statute and that preserved the availability of the same punishment authorized by the earlier, unconstitutional statute did not result in an ex post facto violation given that the earlier statute "provided fair warning as to the degree of culpability which the State ascribed to the

act of murder." *Dobbert*, 432 U.S. at 297, 97 S. Ct. at 2300, 53 L. Ed. 2d at 359. Although defendant attempts to distinguish *Dobbert* as a procedural, rather than a substantive, decision, we believe that *Dobbert* is not subject to the sort of parsing that defendant urges us to conduct. Instead of resting on a substance – procedure dichotomy, *Dobbert* hinged upon both the ameliorative nature of the challenged statutory change and the fact that the changes were procedural in nature. *Id.* at 292, 97 S. Ct. at 2298, 53 L. Ed. 2d at 355. As a result, given that N.C.G.S. §§ 15A-1340.19A to 15A-1340.19D make a reduced sentence available to defendant and specify procedures that a sentencing judge is required to use in making the sentencing decision, we believe that defendant's challenge to the validity of the relevant statutory provisions as an impermissible ex post facto law is without merit.

Thus, for the reasons set forth above, we conclude that the Court of Appeals decision to the effect that N.C.G.S. §§ 15A-1340.19A to 15A-1340.19D incorporated a presumption in favor of the imposition of a sentence of life imprisonment without the possibility of parole upon juveniles convicted of first-degree murder on the basis of a theory other than the felony murder rule was erroneous, that the relevant statutory provisions do not incorporate a presumption in favor of a sentence of life without parole, and that the Court of Appeals correctly rejected defendant's challenge to N.C.G.S. §§ 15A-1340.19A to 15A-1340.19D as impermissibly vague, conducive to the imposition of arbitrary punishments, or an unconstitutional ex post facto law. On remand, the required further sentencing proceedings must be conducted in a manner that is not inconsistent with this opinion and the decisions of the United States Supreme Court in *Miller* and *Montgomery*. As a result, we hold that the Court of Appeals decision should be modified and affirmed, and that this case should be remanded to the Court of Appeals for further remand to the Superior Court, Mecklenburg County, for further proceedings not inconsistent with this opinion, including further sentencing proceedings.

MODIFIED AND AFFIRMED; REMANDED.

Justice BEASLEY dissenting.

While I agree with the majority that defendant is entitled to resentencing and that the statute does not constitute an ex post facto law or violate due process protections, I disagree with the majority's judicial construction of N.C.G.S. § 15A-1340.19C(a). The majority finds seemingly ambiguous language within N.C.G.S. § 15A-1340.19C(a), in order to read it as constitutionally complying with *Miller v. Alabama*, 567 U.S.

460, 183 L. Ed. 2d 407 (2012); however, N.C.G.S. § 15A-1340.19C(a) is clear and unambiguous, and I would hold the plain meaning of this section unconstitutional under *Miller* because it creates a presumption in favor of sentencing a juvenile to life without parole. Therefore, I respectfully dissent.

Here, defendant challenges, *inter alia*, N.C.G.S. § 15A-1340.19C(a) as creating a presumptive sentence of life without parole for juveniles in direct opposition to the Supreme Court of the United States' interpretation of the Eighth Amendment's prohibition of cruel and unusual punishments in *Miller*. *See Miller*, 567 U.S. at 470, 183 L. Ed. 2d at 418; *see also Montgomery v. Louisiana*, 577 U.S. ___, ___, 193 L. Ed. 2d 599, 622 (2016) (holding that *Miller* is a substantive rule of constitutional law and thus applying its standard retroactively to juveniles sentenced to life without parole by allowing "juvenile homicide offenders to be considered for parole, rather than by resentencing them"). "Although *Miller* did not foreclose a sentencer's ability to impose life without parole on a juvenile, the Court explained that a lifetime in prison is a disproportionate sentence for all but the *rarest of children*, those whose crimes reflect 'irreparable corruption.' " *Montgomery*, 577 U.S. at ___, 193 L. Ed. 2d at 611 (emphasis added) (quoting *Miller*, 567 U.S. at 479-80, 183 L. Ed. 2d at 424 (quoting *Roper v. Simmons*, 543 U.S. 551, 573, 161 L. Ed. 2d 1, 24 (2005))). Therefore, a presumption in favor of sentencing a juvenile to life without parole would contravene *Miller*'s admonition to only sentence the "rarest" of juveniles to such a punishment.

"Where the language of a [statute] is clear and unambiguous, there is no room for judicial construction and the courts must give [the statute] its plain and definite meaning, and are without power to interpolate, or superimpose, provisions and limitations not contained therein." *King v. Albemarle Hosp. Auth.*, ___ N.C. ___, ___, 809 S.E.2d 847, 852 (2018) (Beasley, J., dissenting) (brackets in original) (quoting *State v. Camp*, 286 N.C. 148, 152, 209 S.E.2d 754, 756 (1974)); *see also Dep't of Transp. v. Adams Outdoor Advert. of Charlotte Ltd. P'ship*, 370 N.C. 101, 107, 804 S.E.2d 486, 492 (2017) ("When the language of a statute is plain and free from ambiguity, expressing a single, definite and sensible meaning, that meaning is conclusively presumed to be the meaning which the Legislature intended, and the statute must be interpreted accordingly." (quoting *State Highway Comm'n v. Hemphill*, 269 N.C. 535, 539, 153 S.E.2d 22, 26 (1967))). In fact, "[t]he actual intention of the legislat[ure] is quite immaterial [to a plain reading construction]; what matters is the way in which [legislators] ha[ve] actually expressed [their] intention. We must look to the wording of the statute, and to that alone." *King*, ___

N.C. at ___, 809 S.E.2d at 852 (alterations two through five in original (quoting Ernest Bruncken, *Interpretation of the Written Law*, 25 Yale L.J. 129, 130 (1915))).

N.C.G.S. § 15A-1340.19C(a), with respect to sentencing a juvenile upon a conviction for first-degree murder based on a theory of premeditation and deliberation, provides that "[t]he court shall consider any *mitigating* factors in determining whether, based upon all the circumstances of the offense and the particular circumstances of the defendant, the defendant should be sentenced to life imprisonment with parole *instead of* life imprisonment without parole." N.C.G.S. § 15A-1340.19C(a) (2017) (emphases added). In interpreting the plain meaning of this section, defendant argues that the language " 'instead of' strongly suggests that a sentence of life with parole is simply a secondary alternative to the default sentence of life without parole." Defendant further contends that "the court's decision under the sentencing scheme is guided almost exclusively by the existence of mitigating factors" and "does not require evidence of any aggravating factors that would render a juvenile eligible for the higher sentence of life without parole." Defendant notes that mitigating factors are used by defendants only to show that their case "warrant[s] a less severe sentence." *State v. Norris*, 360 N.C. 507, 512, 630 S.E.2d 915, 918, *cert. denied*, 549 U.S. 1064, 166 L. Ed. 2d 535 (2006).

Here, the Court of Appeals found "that the use of 'instead of' [in N.C.G.S. § 15A-1340.19C(a)], considered alone, does not show there is a presumption in favor of life without parole." *State v. James*, ___ N.C. App. ___, ___, 786 S.E.2d 73, 79 (2016). Nonetheless, the Court of Appeals also deduced that

> the reason for the General Assembly's use of "instead of" in N.C. Gen. Stat. § 15A-1340.19C(a), as opposed to "or," becomes clear when considered in light of the fact that the sentencing guidelines require the court to consider only mitigating factors. *Because the statutes only provide for mitigation from life without parole to life with parole and not the other way around, it seems the General Assembly has designated life without parole as the default sentence, or the starting point for the court's sentencing analysis.* Thus, to the extent that starting the sentencing analysis with life without parole creates a presumption, we agree with defendant there is a presumption.

Id. at ___, 786 S.E.2d at 79 (emphasis added).

In this case, the legislature expressed its meaning unambiguously in N.C.G.S. § 15A-1340.19C(a) to require a presumption for life without parole, and I agree with the Court of Appeals' conclusion that this provision creates a presumption for life without parole. *Id.* at ___, 786 S.E.2d at 79. Unlike the Court of Appeals, however, I would find the existence of a presumption in favor of sentencing a juvenile to life without parole unconstitutional under *Miller*.

A presumptive sentence of life without parole for juveniles sentenced under this statute contradicts *Miller*. "*Miller* determined that sentencing a child to life without parole is excessive for all but 'the rare juvenile offender whose crime reflects irreparable corruption.' " *Montgomery*, 577 U.S. at ___, 193 L. Ed. 2d at 619 (quoting *Miller*, 567 U.S. at 479-80, 183 L. Ed. 2d at 424). Furthermore, *Miller* and its predecessors, *Roper v. Simmons* and *Graham v. Florida*, have emphatically established "that children are constitutionally different from adults for purposes of sentencing." *Miller*, 567 U.S. at 471, 183 L. Ed. 2d at 418; *see Roper*, 543 U.S. at 568, 161 L. Ed. 2d at 21-22 (holding that the death penalty may not be constitutionally imposed on juveniles because to do so would violate the Eighth Amendment); *see also Graham v. Florida*, 560 U.S. 48, 74, 176 L. Ed. 2d 825, 845 (2010) ("This Court now holds that for a juvenile offender who did not commit homicide the Eighth Amendment forbids the sentence of life without parole."). Juveniles "are less deserving of the most severe punishments," *Miller*, 567 U.S. at 471, 183 L. Ed. 2d at 418 (quoting *Graham*, 560 U.S. at 68, 176 L. Ed. 2d at 841), and "the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes." *Id.* at 472, 183 L. Ed. 2d at 419. A presumption in favor of life without parole—the harshest sentence that a juvenile may receive constitutionally under the Eighth Amendment—flouts *Miller* and should not be upheld by this Court.[1]

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1. Other state courts have looked at this issue similarly, in light of the United States Supreme Court's directive that the sentence of life without parole must be reserved for only the rarest of juvenile offenders. For example, some jurisdictions have read *Miller* to require the sentencing court to make a more individualized finding that the sentence of life without parole is warranted. *See. e.g.*, *Commonwealth v. Batts*, 163 A.3d 410, 452 (Pa. 2017) ("The United States Supreme Court did not outlaw a sentence of life in prison without the possibility of parole for all juveniles convicted of first-degree murder; it is only a disproportionate (illegal) sentence for those offenders who may be capable of rehabilitation. Therefore, the presumption against the imposition of this punishment is rebuttable by the Commonwealth upon proof that the juvenile is removed from this generally recognized class of potentially rehabilitable offenders." (citations omitted)); *People v. Hyatt*, 316 Mich. App. 368, 419, 891 N.W.2d 549, 574 ("The cautionary language employed by the Court in *Roper*, *Graham*, *Miller*, and *Montgomery* must be honored by this Court. In light

Here, the presumption of life without parole is apparent when considering that, in combination with its use of the phrase "instead of," N.C.G.S. § 15A-1340.19C(a) only requires the trial court to evaluate mitigating factors. While the majority aptly demonstrates that "instead of" is defined as "an alternative or substitute," rather than a categorical indication of one preferred method over another, the majority fails to properly consider the role of weighing aggravating versus mitigating factors and the effect of this balancing process on the trial court's choice to sentence a defendant to "life imprisonment with parole *instead of* life imprisonment without parole." N.C.G.S. § 15A-1340.19C(a) (emphasis added). Specifically, after recognizing that mitigation makes a sentence "less severe, serious, or painful," the majority merely concludes that requiring consideration of only mitigating factors "does not compel the conclusion that persuading the sentencing court to adopt and credit

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of this language and our need to review defendant Hyatt's sentence under *Miller*, we conclude that when sentencing a juvenile offender, a trial court must begin with the understanding that in all but the rarest of circumstances, a life-without-parole sentence will be disproportionate for the juvenile offender at issue."), *appeal denied sub nom.*, *People v. Williams*, 500 Mich. 921, 888 N.W.2d 64 (2016); *Aiken v. Byars*, 410 S.C. 534, 543, 765 S.E.2d 572, 577 (2014) ("*Miller* does more than ban mandatory life sentencing schemes for juveniles; it establishes an affirmative requirement that courts fully explore the impact of the defendant's juvenility on the sentence rendered."), *cert. denied*, ___ U.S. ___, 192 L. Ed. 2d 179 (2015).

Furthermore, some states have taken the admonition that these sentences must truly be a rare occurrence even further by entirely abolishing the penalty of life without parole for juvenile offenders. In fact, according to an Associated Press study conducted in July 2017, the following states have entirely abolished life without parole for juveniles: Alaska, Connecticut, District of Columbia, Hawaii, Iowa, Kansas, Kentucky, Massachusetts, Minnesota, Montana, Nevada, New Jersey, North Dakota, South Carolina, South Dakota, Utah, Vermont, West Virginia, and Wyoming. The Associated Press, *A State-By-State Look at Juvenile Life Without Parole*, U.S. News (July 31, 2017, 5:28 p.m.), https://www.usnews.com/news/best-states/utah/articles/2017-07-31/a-state-by-state-look-at-juvenile-life-without-parole. Of particular relevance here, of these states abolishing life without parole for juveniles after *Miller*, Iowa and Massachusetts did so through judicial rulings. *See State v. Sweet*, 879 N.W.2d 811, 832 (Iowa 2016) (holding the sentence of life without parole for juvenile offenders unconstitutional under the Iowa Constitution, but also noting that "in Iowa, the United States Constitution as interpreted by the Supreme Court prevents the state from imposing life without the possibility of parole in most homicide cases involving juveniles. If life without the possibility of parole may be imposed at all under federal law, which is unclear at this point, *it may be imposed only in cases where irretrievable corruption has been demonstrated by the "rarest" of juvenile offenders*." (emphasis added)); *Diatchenko v. Dist. Att'y for Suffolk Dist.*, 466 Mass. 655, 667-71, 1 N.E.3d 270, 282-85 (2013) (invalidating a mandatory juvenile life without parole scheme as unconstitutional under *Miller* and the Massachusetts State Constitution and also holding a discretionary sentencing system to impose life without parole on a juvenile unconstitutional under the state constitution).

such mitigating evidence is necessary in order to preclude the imposition of a more severe, and presumptively correct, sentence." Given the majority's provided definition of mitigating (namely, reducing the severity of a sentence), the consideration of mitigating circumstances can only operate to move from a harsher to a lesser sentence. Therefore, in this context, mitigation can only mean one thing—moving from imposing a life sentence without the possibility of parole to a life sentence with the possibility of parole.

The statute's language, viewed both independently and in conjunction with the other portions of the North Carolina structured sentencing statutes codified in Article 81B of Chapter 15A, in which trial courts weigh not only mitigating factors but also aggravating factors, compels the conclusion that N.C.G.S. § 15A-1340.19C(a) creates a presumption in favor of sentences of life without parole. *See*, *e.g.*, N.C.G.S. § 15A-1340.16 (2017) (describing the general procedures for consideration of aggravating and mitigating factors when moving beyond the presumptive range for sentencing, and including a list of both types of factors); *id.* § 15A-1340.16B(a) (requiring imposition of a life imprisonment without parole sentence "[i]f a person is convicted of a Class B1 felony and it is found as provided in this section that: (i) the person committed the felony against a victim who was 13 years of age or younger at the time of the offense and (ii) the person has one or more prior convictions of a Class B1 felony," unless there are mitigating factors present); *id.* § 15A-1340.16E (requiring the State to prove criminal gang activity in the same manner as an aggravating factor in order to impose enhanced sentence); *id.* § 15A-1340.17(c) (containing the classification of offenses and prior record level charts and explaining how to consider aggravating and mitigating factors when sentencing). If the statute required both a consideration of aggravating and mitigating circumstances, it would be possible to see how a juvenile's sentence could be elevated from life with parole to life without parole, the harshest of sentences possible for juvenile offenders. *Cf. Circumstance*, *Black's Law Dictionary* (10th ed. 2014) (defining "aggravating circumstance" as "[a] fact or situation that relates to a criminal offense or defendant and that is considered by the court in imposing punishment (esp. a death sentence)"). A consideration of aggravating circumstances would allow the trial court to better decide when to move from sentencing a defendant to life with parole to life without parole. Particularly, a trial court's consideration of aggravating circumstances may help to identify "those whose crimes reflect permanent incorrigibility." *Montgomery*, ___ U.S. at ___, 193 L. Ed. 2d at 620.

Additionally, the consideration of aggravating circumstances in this context makes sense when considering that the Supreme Court has compared a juvenile's sentence of life without parole with an adult's sentence of the death penalty. In *Graham*, the court said that

> life without parole is "the second most severe penalty permitted by law." It is true that a death sentence is "unique in its severity and irrevocability," yet life without parole sentences share some characteristics with death sentences that are shared by no other sentences. The State does not execute the offender sentenced to life without parole, but the sentence alters the offender's life by a forfeiture that is irrevocable. It deprives the convict of the most basic liberties without giving hope of restoration, except perhaps by executive clemency—the remote possibility of which does not mitigate the harshness of the sentence. As one court observed in overturning a life without parole sentence for a juvenile defendant, this sentence "means denial of hope; it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit of [the convict], he will remain in prison for the rest of his days."

560 U.S. at 69-70, 176 L. Ed. 2d at 842 (brackets in original) (citations omitted).

Importantly, for the death penalty "[t]o pass constitutional muster, a capital sentencing scheme must 'genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.' " *Lowenfield v. Phelps*, 484 U.S. 231, 244, 98 L. Ed. 2d 568, 581 (1988) (quoting *Zant v. Stephens*, 462 U.S. 862, 877, 77 L. Ed. 2d 235, 249-50 (1983)). Just as the Supreme Court has required narrow tailoring for capital sentencing, the Court in the *Graham–Roper–Miller–Montgomery* line of cases mandated that sentencing jurisdictions provide sufficient safeguards to account for the unique position of juveniles and reserve juvenile sentences of life without parole to only the rarest of circumstances.

Here, the plain meaning of N.C.G.S. § 15A-1340.19C(a) starts with a presumption of life without parole and only allows a juvenile to mitigate to a reduced sentence of life with parole. Starting with a presumption of life without parole means juveniles will always have to demonstrate that they are not the "rare" case. Because the plain meaning of this statute

does not comply with the Supreme Court's interpretation of the Eighth Amendment in *Miller*, I respectfully dissent.

Justice HUDSON joins in this dissenting opinion.

STATE OF NORTH CAROLINA
v.
AMANDA GAYLE REED

No. 331A16

Filed 11 May 2018

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 789 S.E.2d 703 (2016), vacating defendant's convictions after appeal from a judgment entered on 6 October 2014 by Judge Charles H. Henry in Superior Court, Onslow County. Heard in the Supreme Court on 17 April 2018.

Joshua H. Stein, Attorney General, by Derrick C. Mertz, Special Deputy Attorney General, for the State-appellant.

Mark R. Sigmon for defendant-appellee.

PER CURIAM.

We reverse the decision of the Court of Appeals for the reasons stated in the dissenting opinion.

REVERSED.

STATE v. VARNER

[371 N.C. 107 (2018)]

STATE OF NORTH CAROLINA
v.
DEAN MICHAEL VARNER

No. 115PA17

Filed 11 May 2018

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 796 S.E.2d 834 (2017), reversing and remanding a judgment entered on 14 January 2016 by Judge Thomas H. Lock in Superior Court, Lee County. Heard in the Supreme Court on 18 April 2018.

Joshua H. Stein, Attorney General, by Kathleen N. Bolton, Assistant Attorney General, and Anne M. Middleton, Special Deputy Attorney General, for the State-appellant.

Glenn Gerding, Appellate Defender, by John F. Carella and Katherine Whitney Dickinson-Schultz, Assistant Appellate Defender, for defendant-appellee.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

STATE OF NORTH CAROLINA
v.
ASAIAH BEN YISRAEL

No. 304A17

Filed 11 May 2018

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 804 S.E.2d 742 (2017), finding no error after appeal from a judgment entered on 13 April 2016 by Judge Paul C. Ridgeway in Superior Court, Wake County. Heard in the Supreme Court on 16 April 2018.

Joshua H. Stein, Attorney General, by Mary L. Lucasse, Special Deputy Attorney General, for the State.

Craig M. Cooley for defendant-appellant.

PER CURIAM.

AFFIRMED.

STATE EX REL. UTILS. COMM'N v. N.C. WASTE AWARENESS & REDUCTION NETWORK

[371 N.C. 109 (2018)]

STATE OF NORTH CAROLINA EX REL. UTILITIES COMMISSION; PUBLIC STAFF – NORTH CAROLINA UTILITIES COMMISSION; DUKE ENERGY CAROLINAS, LLC; DUKE ENERGY PROGRESS, LLC; VIRGINIA ELECTRIC AND POWER COMPANY D/B/A DOMINION NORTH CAROLINA POWER

v.

NORTH CAROLINA WASTE AWARENESS AND REDUCTION NETWORK

No. 350A17

Filed 11 May 2018

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 805 S.E.2d 712 (2017), affirming an order of the North Carolina Utilities Commission entered on 15 April 2016 in Docket No. SP-100, Sub 31. Heard in the Supreme Court on 17 April 2018.

Robert B. Josey, Jr. and David T. Drooz, Staff Attorneys for defendant-appellee Public Staff – North Carolina Utilities Commission.

Allen Law Offices, PLLC, by Dwight W. Allen; and Lawrence B. Somers, Deputy General Counsel, Duke Energy Corporation; for defendant-appellees Duke Energy Progress, LLC and Duke Energy Carolinas, LLC.

McGuireWoods, LLP, by E. Brett Breitschwerdt, Andrea R. Kells, and Valyce M. Davis, for defendant-appellee Virginia Electric and Power Company d/b/a Dominion Energy North Carolina.

Law Offices of F. Bryan Brice, Jr., by Matthew D. Quinn; and John D. Runkle for plaintiff-appellant North Carolina Waste Awareness and Reduction Network.

Perrin W. de Jong for Center for Biological Diversity, Food and Water Watch, Friends of the Earth, Greenpeace, Inc., and Institute for Local Self-Reliance; and Howard M. Crystal, pro hac vice, and Anchun Jean Su, pro hac vice, for Center for Biological Diversity, amici curiae.

Burns, Day & Presnell, P.A., by Daniel C. Higgins, for North Carolina Eastern Municipal Power Agency, North Carolina Municipal Power Agency Number 1, and ElectriCities of North Carolina, Inc., amici curiae.

PER CURIAM.

AFFIRMED.

SWAN BEACH COROLLA, L.L.C.; OCEAN ASSOCIATES, LP; LITTLE NECK TOWERS, L.L.C.; GERALD FRIEDMAN; NANCY FRIEDMAN; CHARLES S. FRIEDMAN; 'TIL MORNING, LLC; AND SECOND STAR, LLC

v.

COUNTY OF CURRITUCK; THE CURRITUCK COUNTY BOARD OF COMMISSIONERS; AND JOHN D. RORER, MARION GILBERT, O. VANCE AYDLETT, JR., H.M. PETREY, J. OWEN ETHERIDGE, PAUL MARTIN, AND S. PAUL O'NEAL AS MEMBERS OF THE CURRITUCK COUNTY BOARD OF COMMISSIONERS

No. 397A17

Filed 11 May 2018

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 805 S.E.2d 743 (2017), reversing an order entered on 25 November 2014 by Judge Cy A. Grant denying defendants' motion to set aside entry of default and vacating a default judgment entered on 9 May 2016 by Judge Milton F. Fitch, Jr., both in Superior Court, Currituck County. Heard in the Supreme Court on 17 April 2018.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by J. Mitchell Armbruster and Lacy H. Reaves, for plaintiff-appellants.

Brough Law Firm, PLLC, by G. Nicholas Herman; and Donald I. McRee, Jr., Currituck County Attorney, for defendant-appellees.

Conner Gwyn Schenck PLLC, by James S. Schenck, IV; and Amy Bason, General Counsel, for North Carolina Association of County Commissioners, amicus curiae.

Simonsen Law Firm, P.C., by Lars P. Simonsen and Micah R. Simonsen, for Northern Currituck Outer Banks Association, and Roger W. Knight, P.A., by Roger W. Knight, for Fruitville Beach Civic Association, amici curiae.

PER CURIAM.

AFFIRMED.

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

9 MAY 2018

008P16-2	State v. Teon Jamell Williams	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COAP17-713)	1. Dismissed
		2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis*	2. Allowed
008P18	State v. Bernardo Roberto Pena a/k/a Martin Rangel Pena	1. State's Motion for Temporary Stay (COA16-1075)	1. Allowed **01/09/2018** Dissolved **05/09/2018**
		2. State's Petition for *Writ of Supersedeas*	2. Denied
		3. State's PDR Under N.C.G.S. § 7A-31	3. Denied
012P18	Harrison Hall, Employee v. U.S. Xpress, Inc., Employer and Liberty Mutual Insurance Company, Carrier	1. Defs' Motion for Temporary Stay (COA17-333)	1. Allowed **01/09/2018** Dissolved **05/09/2018**
		2. Defs' Petition for *Writ of Supersedeas*	2. Denied
		3. Defs' PDR Under N.C.G.S. § 7A-31	3. Denied
		4. Plt's Conditional PDR Under N.C.G.S. § 7A-31	4. Dismissed as moot
021P18	State v. Brad Cayton Norwood	1. Def's Motion for Temporary Stay (COA17-301)	1. Allowed **01/19/2018** Dissolved **05/09/2018**
		2. Def's Petition for *Writ of Supersedeas*	2. Denied
		3. Def's PDR Under N.C.G.S. § 7A-31	3. Denied
022P18	State v. Samuel Tyler Potter	1. State's Motion for Temporary Stay (COA17-677)	1. Allowed **01/19/2018** Dissolved **05/09/2018**
		2. State's Petition for *Writ of Supersedeas*	2. Denied
		3. State's PDR Under N.C.G.S. § 7A-31	3. Denied
		4. Def's Conditional PDR Under N.C.G.S. § 7A-31	4. Dismissed as moot

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9 MAY 2018

027P18	The North Carolina State Bar v. Christopher W. Livingston, Attorney	1. Def's *Pro Se* Notice of Appeal Based Upon a Constitutional Question (COA17-277) 2. Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 3. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Decision of COA 4. Plt's Motion to Dismiss Appeal	1. --- 2. Denied 3. Denied 4. Allowed
034P18	Alexis Santos v. North Carolina Mutual, Life Insurance Company	Plt's Petition for *Writ of Certiorari* to Review Order of COA	Denied **Ervin, J., recused**
039P18	Russell F. Walker v. Knats Creek Nursery, Inc.	Plt's *Pro Se* Motion for PDR (COAP18-21)	Denied
040P17-2	Arthur O. Armstrong v. North Carolina, et al.	Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus*	Denied
041P18	Raymond Clifton Parker v. Michael de Sherbinin and wife, Elizabeth de Sherbinin	Defs' PDR Under N.C.G.S. § 7A-31 (COA17-377)	Denied
042P04-10	State v. Larry McLeod Pulley	Def's *Pro Se* Motion to a Formal Complaint	Denied
043P18	Jonathan H. Bynum v. Lincolnton Housing Authority, Lincoln County Tax Office, Lincoln County Animal Shelter, and Super Service	1. Plt's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Lincoln County (Lincolnton Housing Authority) 2. Plt's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Lincoln County (Lincoln County Tax Office) 3. Plt's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Lincoln County (Lincoln County Animal Shelter) 4. Plt's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Lincoln County (Super Service) 5. Plt's *Pro Se* Motion for Rehearing 6. Plt's *Pro Se* Motion to Affirm 7. Plt's *Pro Se* Petiton for *Writ of Certiorari* (*Bynum v. VA*)	1. Dismissed 2. Dismissed 3. Dismissed 4. Dismissed 5. Dismissed 6. Dismissed 7. Dismissed

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

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		8. Plt's *Pro Se* Motion to Rehear (*Bynum v. VA*)	8. Dismissed
		9. Plt's *Pro Se* Petition for *Writ of Certiorari* (*Bynum v. N.C. State National Guard*)	9. Dismissed
		10. Plt's *Pro Se* Petition for *Writ of Certiorari* (*Bynum v. Dep't of Corrections, State of North Carolina*)	10. Dismissed
		11. Plt's *Pro Se* Petition for *Writ of Certiorari* (*Bynum v. Social Services/ DSS, State of North Carolina)*	11. Dismissed
		12. Plt's *Pro Se* Petition for *Writ of Certiorari* (*Bynum v. Lincoln County, State of North Carolina*)	12. Dismissed
		13. Plt's *Pro Se* Petition for *Writ of Certiorari* (*Bynum v. Social Security Office*)	13. Dismissed
		14. Plt's *Pro Se* Motion for Rehearing (*Bynum v. Social Security Office*)	14. Dismissed
		15. Plt's *Pro Se* Petition for *Writ of Certiorari* (*Bynum v. U.S. Post Office*)	15. Dismissed
		16. Plt's *Pro Se* Motion for Rehearing (*Bynum v. Clerk of Lincoln County*)	16. Dismissed
		17. Plt's *Pro Se* Motion for Appeal (*Bynum v. Clerk of Lincoln County*)	17. Dismissed
		18. Plt's *Pro Se* Motion for Rehearing (*Bynum v. BB&T Bank*)	18. Dismissed
		19. Plt's *Pro Se* Motion for Appeal (*Bynum v. BB&T Bank*)	19. Dismissed
052P18	Nathaniel Sargent and Kristin Sargent v. Austin Edwards, Shawn Stephenson, and Bloom Construction	Plts' PDR Under N.C.G.S. § 7A-31 (COA17-623)	Denied
053P18	State v. Anthony Worth Wyrick	Def's PDR Under N.C.G.S. § 7A-31 (COA16-1244)	Denied
056P18	In the Matter of B.E.M.	1. Respondents' (David and Michelle Coldren) *Pro Se* Motion for Temporary Stay (COA17-663)	1. Denied **02/26/2018**
		2. Respondents' (David and Michelle Coldren) *Pro Se* Petition for *Writ of Supersedeas*	2. Denied
		3. Respondents' (David and Michelle Coldren) *Pro Se* PDR Under N.C.G.S. § 7A-31	3. Denied

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057P18	State v. Derek Antonio Smith, Jr.	1. Def's PDR Under N.C.G.S. § 7A-31 (COA17-153) 2. Def's Motion to Amend Certificate of Service of PDR	1. Denied 2. Allowed
061P18	State v. David Ernest Malinzak	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Forsyth County 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis* 3. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Allowed 3. Dismissed as moot
062P18	State v. Sylvester Ray Andrews, Jr. and Trayvon Markel Powell Moody	1. Def's (Sylvester Ray Andrews, Jr.) PDR Under N.C.G.S. § 7A-31 (COA16-925) 2. Def's (Trayvon Markel Powell Moody) PDR Under N.C.G.S. § 7A-31	1. Denied 2. Denied
063P18	State v. Eric J. Hendrickson	Def's PDR Under N.C.G.S. § 7A-31 (COA16-1019)	Denied
066P18	State v. Freddie David Paige	Def's *Pro Se* Motion for Notice of Appeal	Dismissed
068A18	State v. Jermel Toron Krider	1. State's Motion for Temporary Stay (COA17-272) 2. State's Petition for *Writ of Supersedeas* 3. State's Notice of Appeal Based Upon a Dissent	1. Allowed **03/08/2018** 2. Allowed 3. ---
072P18	State v. Christopher Dorsey	Def's PDR Under N.C.G.S. § 7A-31 (COA17-684)	Denied
077P18	The Cherry Community Organization v. The City of Charlotte; The City Council for the City of Charlotte; and Midtown Area Partners II, LLC	Plt's PDR Under N.C.G.S. § 7A-31 (COA16-1292)	Denied
087P18	State v. Jimmy Orlando Littlejohn	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA17-551)	Dismissed **04/27/2018**

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

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088P18	In the Matter of S.G.V.S. and D.D.R.S.	1. Petitioner's Notice of Appeal Based Upon a Constitutional Question 2. Petitioner's PDR Under N.C.G.S. § 7A-31 3. Respondent-Mother's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed
091P18	State v. Jerome Johnson	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA17-412)	Denied
098P18	State v. Clarence Adrian Royster	Def's PDR Under N.C.G.S. § 7A-31 (COA17-823)	Denied
100P18	David A. Perez v. Laurie S. Perez	1. Plt's *Pro Se* Motion for Temporary Stay (COA17-512) 2. Plt's *Pro Se* Petition for *Writ of Supersedeas* 3. Plt's *Pro Se* PDR Under N.C.G.S. § 7A-31	1. Allowed **04/05/2018** 2. 3.
104P18	Nathaniel R. Webb v. North Carolina Office of Indigent Defense Services, et al.	Plt's *Pro Se* Petition for *Writ of Mandamus*	Denied **04/17/2018**
105P18	Nathaniel R. Webb v. North Carolina State Highway Patrol, et al.	Plt's Pro Se Petition for *Writ of Mandamus*	Denied **04/17/2018**
107P18	State v. Jamal M. Watson	1. Def's Motion for Temporary Stay (COA17-253) 2. Def's Petition for *Writ of Supersedeas* 3. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **04/10/2018** 2. 3.
109P17-4	In re Olander R. Bynum	Petitioner's *Pro Se* Motion for Petition for Rehearing	Dismissed
114P18	State v. Rotonya Russell	Def's PDR Under N.C.G.S. § 7A-31 (COA17-427)	Denied
116P18	State v. Nicholas Nacoleon Harding	1. Def's Motion for Temporary Stay (COA17-448) 2. Def's Petition for *Writ of Supersedeas*	1. Allowed **04/11/2018** 2.
118P18	State v. Maurice L. Stroud	Def's *Pro Se* Motion for PDR	Dismissed

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

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119P18	State v. Christopher B. Smith	1. Def's Motion for Temporary Stay (COA17-680) 2. Def's Petition for *Writ of Supersedeas*	1. Allowed **04/19/2018** 2.
131P16-8	State v. Somchoi Noonsab	Def's *Pro Se* Motion for Review of Constitutional Questions	Dismissed
131P18	State v. Zachary Allen Blankenship	1. State's Motion for Temporary Stay (COA17-713) 2. State's Petition for *Writ of Supersedeas*	1. Allowed **05/03/2018** 2.
133P18	Harris Emanuel Ford v. Erik A. Hooks Secretary of NC Department of Public Safety	Petition for *Writ of Habeas Corpus*	Denied **05/07/18** **Hudson, J., recused**
186P17-2	State v. Lenwood Lee Paige	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Decision of COA (COA06-3) 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis*	1. Dismissed 2. Allowed **Hudson, J., recused**
209P17	Christian G. Plasman, in his Individual Capacity and derivatively for the benefit of, on behalf of and right of nominal party Bolier & Company, LLC v. Decca Furniture (USA), Inc., Decca Contract Furniture, LLC, Richard Herbst, Wai Theng Tin, Tsang C. Hung, Decca Furniture, Ltd., Decca Hospitality Furnishings, LLC, Dongguan Decca Furniture Co. Ltd., Darren Hudgins, Decca Home, LLC, and Elan by Decca, LLC, and Bolier & Company, LLC, nominal defendant v. Christian J. Plasman a/k/a Barrett Plasman, third-party defendant	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA16-777) 2. Plt's Petition for *Writ of Certiorari* to Review Order of COA	1. Denied 2. Denied

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

9 MAY 2018

210P17	Christian G. Plasman, in his Individual Capacity and derivatively for the benefit of, on behalf of and right of nominal party Bolier & Company, LLC v. Decca Furniture (USA), Inc., Decca Contract Furniture, LLC, Richard Herbst, Wai Theng Tin, Tsang C. Hung, Decca Furniture, Ltd., Decca Hospitality Furnishings, LLC, Dongguan Decca Furniture Co. Ltd., Darren Hudgins, Decca Home, LLC, and Elan by Decca, LLC, and Bolier & Company, LLC, nominal defendant v. Christian J. Plasman a/k/a Barrett Plasman, third-party defendant	Plt's Petition for *Writ of Certiorari* to Review Order of COA (COA16-1156)	Denied
221PA17	State v. Willie James Langley	Def's Motion to Withdraw as Private Assigned Counsel and to Appoint Appellate Defender	Allowed **04/30/2018**
249P11-6	State v. Bobby Ray Grady	Def's *Pro Se* Petition for *Writ of Mandamus* (COAP17-914)	Dismissed as moot
281P17	State v. Christopher Scott Ellis	1. State's Motion for Temporary Stay (COA16-938) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **08/18/2017** Dissolved **05/09/2018** 2. Denied 3. Denied
283P17	State v. Willie James Bolder	Def's PDR Under N.C.G.S. § 7A-31 (COA16-814)	Denied
290P15-2	State v. Jeffrey Tryon Collington	1. State's Motion for Temporary Stay (COA17-726) 2. State's Petition for *Writ of Supersedeas*	1. Allowed **04/27/2018** 2.

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

9 MAY 2018

309P15-4	State v. Reginald Underwood Fullard	1. Def's *Pro Se* Motion for Appeal (COAP17-103) 2. Def's *Pro Se* Motion for Petition for Review 3. Def's *Pro Se* Motion to Proceed *In Forma Pauperis*	1. Dismissed *ex mero motu* 2. Dismissed 3. Allowed
322P15-7	Raymond Alan Griffin v. N. Lorrin Freeman, Wake County District Attorney and Paul Ridgeway, Senior Resident Superior Court Judge	Petitioner's *Pro Se* Motion for Notice of Appeal of *Writ of Mandamus* Denial	Dismissed
322P15-8	State v. Raymond Alan Griffin	Def's *Pro Se* Motion for Appeal of Motion for Appropriate Relief by *Certiorari*	Dismissed
331A16	State v. Amanda Gayle Reed	Def's Conditional Petition for *Writ of Certiorari* to Review Decision of COA (COA15-363)	Dismissed as moot
359P17	In the Matter of Anthony Rayshon Bethea	1. Petitioner's Notice of Appeal Based Upon a Constitutional Question (COA17-459) 2. Petitioner's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. — 2. Denied 3. Allowed
368P17	Geneva T. Bullard, Administratrix of the Estate of Vonnie Lee Bullard v. Prime Building Company, Inc. of North Carolina	1. Plt's Notice of Appeal Based Upon a Constitutional Question (COA16-1279) 2. Plt's PDR Under N.C.G.S. § 7A-31 3. Def's Motion to Dismiss Appeal	1. — 2. Denied 3. Allowed
383P17	Karen L. Dillard v. Thomas T. Dillard, Jr.	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COA17-85) 2. Def's *Pro Se* Motion to Procure Original Record 3. Def's *Pro Se* Motion to File and Proceed *In Forma Pauperis*	1. Denied 2. Dismissed 3. Allowed

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393P17	State v. Byron Jerome Parker	1. State's Motion for Temporary Stay (COA17-108)	1. Allowed **11/21/2017** Dissolved **05/09/2018**
		2. State's Petition for *Writ of Supersedeas*	2. Denied
		3. State's PDR Under N.C.G.S. § 7A-31	3. Denied
396P17	State v. Michael Lee White	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA16-945)	1. ---
		2. Def's PDR Under N.C.G.S. § 7A-31	2. Allowed
		3. State's Motion to Dismiss Appeal	3. Allowed
400P17	State v. Patty Meadows	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA16-1207)	1. ---
		2. Def's PDR Under N.C.G.S. § 7A-31	2. Allowed
		3. State of North Carolina's Motion to Dismiss Appeal	3. Allowed
412P17	State v. Raul Pachicano Diaz	1. State's Motion for Temporary Stay (COA17-444)	1. Allowed **12/08/2017**
		2. State's Petition for *Writ of Supersedeas*	2. Allowed
		3. State's Notice of Appeal Based Upon a Constitutional Question	3. Dismissed *ex mero motu*
		4. State's Petition in the Alternative for Discretionary Review Under N.C.G.S. § 7A-31	4. Allowed
414A17-2	Ron David Metcalf v. Susan Hyatt Call	Plt's Pro Se Motion to Reconsider	Dismissed
417P17	In the Matter of P.S.	1. Respondent's Notice of Appeal Based Upon a Constitutional Question (COA17-234)	1. ---
		2. Respondent's PDR Under N.C.G.S. § 7A-31	2. Denied
		3. State's Motion to Dismiss Appeal	3. Allowed
418P17	In the Matter of L.T.	1. Respondent's Notice of Appeal Based Upon a Constitutional Question (COA17-235)	1. ---
		2. Respondent's PDR Under N.C.G.S. § 7A-31	2. Denied
		3. State's Motion to Dismiss Appeal	3. Allowed

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419P17	In the Matter of R.J.	1. Respondent's Notice of Appeal Based Upon a Constitutional Question (COA17-237)	1. ---
		2. Respondent's PDR Under N.C.G.S. § 7A-31	2. Denied
		3. State's Motion to Dismiss Appeal	3. Allowed
420P17	Stephanie T. Trejo v. N.C. Department of State Treasurer Retirement Systems Division	1. Petitioner's Notice of Appeal Based Upon a Constitutional Question Under N.C.G.S. § 7A-30(1) (COA16-1182)	1. ---
		2. Petitioner's PDR Under N.C.G.S. § 7A-31	2. Denied
		3. State's Motion to Dismiss Appeal	3. Allowed
		4. Petitioner's Motion for Temporary Stay	4. Denied **01/23/2018**
		5. Petitioner's Petition for *Writ of Supersedeas*	5. Dismissed as moot
		6. State Employees Association of North Carolina Inc's Motion for Leave to File Amicus Brief in Support of PDR	6. Denied
421P17	State v. Juan Foronte McPhaul	1. Def's PDR Under N.C.G.S. § 7A-31 (COA16-924)	1. Allowed
		2. State's Conditional PDR Under N.C.G.S. § 7A-31	2. Allowed
427P17	State v. Jermaine Antwan Tart	1. State's Motion for Temporary Stay (COA17-561)	1. Allowed **12/15/2017**
		2. State's Petition for *Writ of Supersedeas*	2. Allowed
		3. State's PDR Under N.C.G.S. § 7A-31	3. Allowed
		4. Def's Conditional PDR Under N.C.G.S. § 7A-31	4. Allowed
		5. State's Motion to Amend	5. Allowed
429P17	Jacquelyn Brown, Employee v. N.C. Department of Public Instruction (Macon County Schools), Employer, Self-Insured (Corvel Corporation, Third-Party Administrator)	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA17-276)	1. ---
		2. Plt's Motion to Deem PDR Timely Filed	2. Denied
		3. Plt's Alternative Petition for *Writ of Certiorari*	3. Denied
		4. Def's Motion to Dismiss PDR	4. Allowed

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